Supreme Court, U.S.
FILED

081325 APR 22 2009

OFFICE OF THE CLERK

NO.

In The

Supreme Court of the United States

DEREK BARR, CRAIG WHITE, and CHRIS WHITE,

Petitioners,

V.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Van R. Irion
LAW OFFICE OF VAN R. IRION, PLLC
9040 Executive Park Drive, Suite 223
Knoxville, TN 37923
(865) 809-1505
Attorney for Petitioners

QUESTIONS PRESENTED

Question #1:

Are content-based restrictions on student speech narrowly tailored where they support the educational mission of the school, but also prohibit more speech than is necessary to prevent disruption?

Question #2:

Can the "offensiveness" of a symbol, coupled with a tense school environment, create an irrebuttable presumption that the symbol is likely to cause disruption?

Question #3:

Can restrictions on student speech in a public school be justified via a heckler's veto?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.2(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Sixth Circuit.

The petitioners here and appellants below are Derek Barr, individually, Craig White, individually, and Chris White, individually. All petitioners were minors when the proceedings below were initially filed. Mr. Barr was identified as D.B. in some proceedings below. Mr. Barr's mother Sharon Brogdon was a party only in her capacity as guardian of Mr. Barr. Ms. Brogdon is no longer a party to this case. Craig White and Chris White were identified as R.W. and C.W. respectively in proceedings below. Roger White was a party to earlier proceedings only in his capacity as father of Craig White and Chris White.

The respondents here and appellees below are Steve Lafon, in his individual and official Capacity as Principal of William Blount High School; Alvin Hord, in his official capacity as Director of Schools; and The Blount County School Board.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	vii
Opinions Below	1
Jurisdiction	1
Statutory and Constitutional Provisions Involved	2
Statement of the Case	2
I. Additional Factual Background	11
II. Additional Proceedings Below	11
Reasons for Granting the Petition	12
I. Question 1: Narrow Tailoring of Broad, Categorical, Content-Based Bans Pursuant to *Tinker*	14
A. "Educational Mission" as a Significant Government Interest	14

B. An Accurate Forecast of Disruption Does Not Eliminate the Necessity of Narrow Tailoring 16

C. Conflicting Circuit Opinions 18

D. Narrow Tailoring is Necessary to Prevent All-Encompassing Bans Based Upon Limited Justifications 22

II. Question 2: Irrebuttable Presumptions Based Upon the "Offensiveness" of a Symbol 23

A. "Disruptive Potential" of the Confederate Flag Irrebuttably Presumed 24

B. "Collision with the Rights of Other Students" 26

C. Other Circuits Require Evidence Linking Past Disruptions to the Symbol Being Banned and the Students at Issue 27

III. Use of the Heckler's Veto to Justify Speech Restrictions Under Tinker 31

A. Endorsement of the Heckler's Veto in 32

Any Forum Weakens the Bedrock Principals of the First Amendment

Conclusion 36

Appendix 1a

Part A 1a
Sixth Circuit Opinion Affirming District Court's Grant of Defendants' Motion for Summary Judgment, August 20, 2008

Part B 51a
District Court Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment, May 31, 2007

Part C 53a
Transcript of District Court's Ruling from May 24, 2007 Hearing

Part D 68a
Sixth Circuit Opinion Denying Appellants' Petition for En Banc Rehearing Regarding Grant of Summary Judgment, including Chief Judge Boggs' Dissent, January 23, 2009

Part E 77a
Constitutional Provisions Involved– First Amendment & Fourteenth Amendment

Part F 78a
Statutory Provisions Involved – 48 U.S.C. § 1983

Part G 79a
Sixth Circuit Opinion Affirming District Court's Denial of Plaintiffs' Motion for P reliminary Injunction, June 27, 2008

Part H 95a
District Court Memorandum Opinion and Order Denying Plaintiffs' Motion for Preliminary Injunction, June 30, 2006

Part I 112a
Sixth Circuit Opinion Denying Appellants' Petition for En Banc Rehearing Regarding Denial of Preliminary Injunction, including Chief Judge Boggs' Dissent, June 27, 2008

Part J 120a
Affidavit of Steven Lafon, 3/13/06

Part K 123a
Partial Deposition Transcript of Alvin Hord, January 4, 2007

Part L 131a
Partial Deposition Transcript of Steve Lafon, January 3, 2007

TABLE OF AUTHORITIES

Cases	Page
Bachellar v. Maryland, 397 U.S. 564 (1970)	10,31
Bragg v. Swanson, 371 F.Supp.2d 814 (W.D. W.Vir. 2005)	7,20,21, 23,29,30
Brown v. Louisiana, 383 U.S. 131 (1966)	9,33
Butts v. Dallas Ind. Sch. Dist., 436 F.2d 728 (5th Cir. 1971)	7,20,23,33
Canady v. Bossier Parich Sch. Bd., 240 F.3d 437 (5th Cir. 2001)	3,7,19,20
Center for Bio-Ethical Reform v. L.A. Cnty, Sheriff Dept., 533 F.3d 780 (9th Cir. 2008)	10,31,34
Forsyth Cnty v. Nationalist Movement, 505 U.S. 123 (1992)	10,31
Griggs v. Fort Wayne Sch. Bd., 359 F.Supp.2d 731 (N.D. Ind. 2005)	23,31
Hall v. Bd. of Sch. Comm. Of Mobile Cnty., 681 F.2d 965 (5th Cir. 1982)	3,7,18, 19,23
Hedges v. Wauconda Comm. Unit Sch. Dist.,	33,34

436 F.2d 728 (5th Cir. 1971)

Jacobs v. Clark Cnty Sch. Dist., 526 F.3d 419 (9th Cir. 2008) — 3,7,19

Melton v. Young, 465 F.2d 1332 (6th Cir. 1972) — 27,28

Morse v. Fredrick, 127 S.Ct. 2618 (2008) — Passim

Newsom v. Albemarle Cnty Sch. Bd., 354 F.3d 249 (4th Cir. 2003) — 9,21,23

Police Dept. of the city of Chicago v. Mosley, 408 U.S. 92 (1972) — Passim

R.A.V. v. St. Paul, 505 U.S. 377 (1992) — 15

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3rd Cir 2001) — 23,24

Seidman v. Paradise Valley Unif. Sch. Dist., 327 F.Supp.2d 1098 (D. Ariz. 2004) — 8,23

Sypniewski v. Warren Hills Reg. Bd. Of Ed., 307 F.3d 243 (3rd Cir. 2002) — 9,13,21, 23,28,30

Texas v. Johnson, 491 U.S. 397(1989) — 27,32,35

Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) — Passim

West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000) — 27,28

Dictionary	**Page**
Black's Law Dictionary (Bryan Garner ed., 7th Ed., West 1999)	8,24,25

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated August 20, 2008, affirming the U.S. District Court for the Eastern District of Tennessee's grant of respondents' motion for summary judgment is officially reported at 538 F.3d 554, and is reproduced at App. 1a-50a.

The order of the U.S. Court of Appeals for the Sixth Circuit, dated January 23, 2009, denying petitioners' petition for en banc rehearing, including Chief Judge Boggs dissent from said denial, is officially reported at 553 F.3d 463, and is reproduced at App. 68a-76a.

The Order of the U.S. District Court for the Eastern District of Tennessee, Knoxville Division, dated May 31, 2007, granting defendant-respondents' motion for summary judgment is reproduced at App. 51a-52a. The transcript of the District Court's May 24, 2007 oral ruling is reproduced at App. 53a-67a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on August 20, 2008.

Petition for rehearing with request for en banc rehearing was denied on January 23, 2009. This petition is timely filed under 28 U.S.C. § 2101(c)/1254(1) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the denial of petition for rehearing.

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 48 U.S.C. §1983. The relevant statutory provision is reproduced at App. 78a. The relevant constitutional provisions involved are the First and Fourteenth Amendments, and are reproduced at App. 77a.

STATEMENT OF THE CASE

This is one of the most important free-speech cases ever to reach this Court. Resolution of the questions presented by this case will affect policies in every public school in the country, and will largely determine whether First Amendment protections retain any substantive meaning in the public school setting.

Only two months after this Court's opinion in *Morse*, the Sixth Circuit cited protection of a defendant school's "mission to educate its students" as justification for a categorical prohibition of all displays of the Confederate flag in school. Compare *Morse v. Frederick*, 127 S.Ct 2618, 2637 (2008) with App. 46a. The Circuit Court explained that as long as the regulation prevents disruption it supports the educational mission and, therefore, is automatically

narrowly tailored. App. 46a-48a. This analysis is exactly what Justices Alito and Kennedy explicitly warned would be rejected in their concurring opinion in *Morse*. 127 S.Ct at 2637.

Not surprisingly, precedent from both the Fifth and Ninth Circuits reveals that those Courts would have reached the opposite opinion on this issue than was reached by the Sixth Circuit. *Hall v. Board of School Commissioners of Mobile County* 681 F.2d 965, (5th Cir. 1982); *Canady v. Bossier Parish School Board*, 240 F.3d 437, 442-43 (5th Cir. 2001); *Jacobs v. Clark County School Dist.*, 526 F.3d 419, 434 (9th Cir. 2008).

Respondents, administrators of a high school in Tennessee, enforce an official policy that categorically prohibits any display of the Confederate flag in school. App. 3a-4a. It is undisputed that the respondents' prohibition is enforced against all students, at all times, and regardless of any circumstances related to particular displays. App. 4a; 124a; 134a-135a. Individual school employees are instructed to enforce the policy against the Confederate flag even if they are certain that a particular display will not cause a disruption. It is undisputed that the defendants do not enforce such a categorical ban against other flags, expressions of political opinion, or symbolic speech. App. 3a-4a; 132a-134a. In other words, determinations of likely disruption in relation to other symbols are determined on a case by case basis. *Id.*

The respondents have stated that their prohibition will remain in place permanently and will continue to be enforced against all displays of the Confederate flag, regardless of individual circumstances. App. 125a-126a; 130a; 134a-135a. Surprisingly, the respondents also admit that they would continue to enforce their regulation even if they were certain that such displays would not cause disruption in the school. App. 130a.

The respondents justify their policy by citing evidence of racial tension in the school. App. 5a-13a. However, none of the incidents cited were linked to the Confederate flag in any way, nor were the petitioners involved in the cited incidents. App. 22a; 73a. Undisputed evidence shows that the Confederate flag was present in the school at least two dozen times, despite the challenged regulation, yet the flag was never associated with any disruptions of any kind. App. 12a; 73a.

Petitioners, students at the school, view themselves as southerners and take pride in their southern heritage. All petitioners view the Confederate flag as a symbol of their ancestor's sacrifices in the War for State's rights (a.k.a. the Civil War) and consider the Confederate flag to be a political statement. None of the petitioners' displays of the Confederate flag in the school have caused any disruptions. App. 73a. All petitioners have been forced by school employees to remove or cover up displays of the Confederate flag upon threat of suspension from school. 12a-13a.

Petitioners first brought this case in the District Court for the Eastern District of Tennessee pursuant to 28 U.S.C. §§ 1331 due to the involvement of claims for violation of the United States Constitution, citing remedies provided by 42 U.S.C. § 1983.

All parties and courts agree that the respondents' policy is a content-based regulation of speech prohibiting a political symbol. App. 40a.

The District Court granted summary judgment in favor of the respondents. App.51a-67a. The Sixth Circuit affirmed the District Court's grant of summary judgment and denied petitioners petition for en banc rehearing. App. 1a-50a. The Chief Judge for the Sixth Circuit dissented from his Court's order denying rehearing. App.68a-76a. His dissenting opinion cited several of the issues addressed in this petition. *Id.*

The Sixth Circuit's refusal to find the respondents' regulation unconstitutional for lack of narrow tailoring is a radical departure from established First Amendment jurisprudence, including this Court's decisions in *Morse*, *Tinker* and *Mosley*. 127 S.Ct at 2637; *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Police Dept. of the city of Chicago v. Mosley*, 408 U.S. 92 (1972). By citing the broad educational mission of the school, rather than the specific justification for the policy at issue, the Appellate Court endorsed speech restrictions that are much broader than necessary.

The Appellate Court's opinion established that once schools have shown a reasonable forecast of disruption they have also conclusively proven that the challenged regulation is narrowly tailored, by virtue of having met the *Tinker* standard. App. 46a-49a. This conclusion erroneously presumes that a regulation which is actually necessary to prevent disruption cannot *also* prevent more speech than is necessary to fulfill the regulation's legitimate purpose. While some regulations may happen to be properly tailored due to a rigorous application of *Tinker* to an already narrow set of circumstances, deferential application of *Tinker* to broad categorical regulations requires an additional step: analysis of appropriate scope of the regulation. The Sixth Circuit's ruling obviates this necessary additional step.

By establishing that the school's "mission to educate its students" is the significant government interest, the Sixth Circuit's opinion epitomizes the danger predicted by Justices Alito and Kennedys' concurring opinion in *Morse*:

> "The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission. (citations omitted). This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs." 127 S.Ct at 2637.

Such abuse occurred two months later. App. 1a-50a.

Not surprisingly, the Fifth Circuit has reached a diametrically opposed conclusion under similar circumstances in a case that applies *Tinker* and then holds the regulation unconstitutional because it was not narrowly tailored to its legitimate state interest. *Hall v. Board of School Commissioners of Mobile County*, 681 F.2d 965, (5th Cir. 1982)(citing *Mosley*)[1]; see also *Butts v. Dallas Independent School District*, 436 F.2d 728, 732 (5th Cir. 1971); and *Bragg v. Swanson*, 371 F.Supp.2d 814 (W.D. W.Vir. 2005).

In addition, both the Fifth and Ninth Circuits recently confirmed the need for strict scrutiny of regulations justified under *Tinker*. *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001); *Jacobs v. Clark County School Dist.*, 526 F.3d 419 (9th Cir. 2008). While *Jacobs* and *Canady* distinguish *Tinker*, they do so by pointing out that *Tinker* applies only to *content-based* regulations, whereas their new "intermediate scrutiny" tests apply to *content-neutral* speech restrictions in the school setting. *Id* at 442-43 and 434, respectively. Both cases clearly establish that a more stringent narrow tailoring is required for

---

[1] The plaintiffs in *Hall* were teachers, as opposed to students. However, the *Hall* Court makes no mention of this distinction in its application of *Tinker* or its finding that the regulation was not narrowly tailored to its legitimate purpose. Nothing in *Hall*, nor in any other Circuit decisions, suggests that the narrow tailoring requirement is necessarily fulfilled simply because a reasonable forecast of disruption is shown.

regulations that are justified via *Tinker* because *Tinker* applies to content-based restrictions. *Id*; see also *Seidman v. Paradise Valley Unified School Distr. No. 69*, 327 F.Supp.2d 1098, 1115 (D.Ariz. 2004)(citing *Mosley*).

The second question presented by this petition requests review of the Sixth Circuit's creation of new irrebuttable presumptions regarding unpopular symbols and the effect those presumptions have upon the evidentiary burden required under *Tinker* to justify a ban on such symbols. The Sixth Circuit's new presumptions essentially reverse the burden established by the *Tinker* Court.

In the present case the Sixth Circuit irrebuttably presumed the "disruptive potential of the [Confederate] flag" in schools that have experienced "high racial tension."*See* App. 29a-30a.[2] Since no evidence linked the Confederate flag to any disruptions, the Circuit Court's conclusion was, by definition, a presumption. *Black's Law Dictionary* 1203-4 (Bryan Garner ed., 7th ed., West 1999).[3] More

---

[2] While the Sixth Circuit's opinion does not use the term "irrebutable presumption," its affirmation of summary judgment in the face of undisputed evidence that the symbol in question was present and failed to cause disruption, is legally equivalent to creating an irrebutable presumption. *Black's Law Dictionary* at 1203. The Appellate Court's reasoning and focus on the "offensiveness" of the flag also supports this assertion. *See* App. 33a-34a.

[3] Presumptions are defined as assumed facts that require no evidentiary support. Irrebuttable presumptions are defined as presumptions that cannot be overcome by evidence. *Blacks Law Dictionary* 7th Ed. 1203-4.

importantly, since the Circuit Court ignored undisputed evidence that the flag's presence in the school had actually failed to cause any disruption, the presumption was elevated to an irrebuttable presumption. *Id* at 1204. The fact that the present case was a review of summary judgment further establishes the irrebuttable presumption within the Sixth Circuit's ruling.

This latest lowering of the bar for school officials also appears to conflict with general principals followed by other circuits. See *Newsom v. Albemarle County School Board*, 354 F.3d 249 (4th Cir. 2003); *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, (3rd Cir. 2002).

The third question presented in this petition requests review of the Sixth Circuit's apparent endorsement of the "heckler's veto" as a justification for speech restrictions in the school setting.[4] The Appellate Court's ruling relies upon a conclusion that the Confederate flag is offensive to some students and that such offensiveness might lead to disruption. *See* App. 27a-29a. While the opinion is careful to disclaim that it is justifying a ban on student speech "*merely* because other students find that speech offensive," it further explains that the ban is justified because those offended students are likely to instigate a disruption. *Id* (emphasis in original). In other words, listeners finding speech offense is not

---

[4] The term "heckler's veto" first appeared in a footnote in *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). It is used to describe restrictions on speech that stem from listeners' negative reactions to a particular message.

enough to ban the speech, but if the offended listeners act on that offense, this justifies silencing the speaker. This is a classic example of using the heckler's veto to justify speech restrictions.

This holding ignores well established precedent that rejects the heckler's veto as a basis for justifying speech restrictions. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Center for Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dept.*, 533 F.3d 780 (9th Cir. 2008). While this Court's *Tinker* opinion may have implicitly created an exception for the school setting, it remains unclear whether that was the *Tinker* Court's intent. As pointed out by the Chief Judge for the Sixth Circuit, this uncertainty has led to widely inconsistent outcomes regarding the use of student offense to justify speech restrictions. App. 70a. At best this uncertainty creates unnecessary litigation, at worst it immunizes government officials who actively suppress unpopular ideas in the school setting. As Judge Boggs stated, "If Tinker is to remain the law, it should not be used as a sword for some expression but as a shield for those who would suppress some unpopular opinions." App. 76a.

Review is urgently needed not only to resolve conflicts between the circuits, but more importantly to clarify the standards related to suppression of unpopular ideas in the school setting. The Sixth Circuit's decision threatens the very foundations of this Court's *Tinker* decision. Despite the Sixth Circuit's assertions to the contrary, its decision immunizes school officials who suppress ideas merely

because the idea is unpopular. Taken together the ruling at issue allows school officials to point to the offensiveness of a symbol, presume that offended students will cause disruption, and conclude that broad categorical prohibitions against that symbol are narrowly tailored solely because they prevent the predicted disruption.

A. Additional Factual Background

The challenged portion of respondents' dress code prohibits "clothing which exhibits written, pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation..." However, petitioners' constitutional challenges, as relevant to this petition, are based upon respondents' undisputed policy as enforced, which is to prohibit all displays of the Confederate flag, under any circumstances, as discussed above.

B. Additional Proceedings Below

On May 31, 2006 the District Court denied petitioners' motion for preliminary injunction. App. 104a-123a. Petitioners appealed that decision and the Sixth Circuit affirmed. App. 95a-111a. Petitioners petitioned for en banc rehearing, which was denied on June 27, 2008. App. 112a-119a. Chief Judge Boggs dissented from his Court's denial of the

petition, stating that he would have granted the motion for preliminary injunction. App. 119a.

REASONS FOR GRANTING THE PETITION

Deference to the judgment of school officials is a well-established and necessary principal. However, if constitutional protections are to be more than "mere platitudes" such deference cannot sanction restrictions that are unnecessarily broad or immunize school officials who admit their unconstitutional motives. The Sixth Circuit's ruling in the present case does both.

This case presents three closely related and exceptionally important questions of federal law that have not been settled by this Court, and on which the circuits are in conflict:

-Are broad, categorical, content-based restrictions on student speech narrowly tailored simply because they support the educational mission of the school?

-Can the "offensiveness" of a symbol, coupled with a tense school environment, create an irrebuttable presumption that the symbol is likely to cause disruption?

-Can restrictions on student speech be justified via a heckler's veto?

The petitioners' respect the difficulty of balancing students' rights to free expression against the educational mission of public schools. The three questions presented here each raise several related doctrines that are best considered together, rather than in isolation. It is the belief of petitioners that the present case offers a unique opportunity to address the interplay between these overlapping constitutional doctrines.

The petitioners' respectfully assert that the Sixth Circuit's ruling fails to strike a sustainable balance between individual rights and countervailing concerns, on all of the points raised herein. Individually any one of the questions presented would be cause for concern. When put together the Circuit Court's ruling creates a perfect storm that completely sinks *Tinker* and conflicts with other Circuits to varying degrees in regard to all three questions.

The Third Circuit previously discussed the connection between two of these three issues in the context of school speech restrictions: "When policies focus broadly on listeners' reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech." *Sypniewski*, 307 F.3d at 269-70.

I. Question 1: Narrow Tailoring of Broad, Categorical, Content-Based Bans Pursuant to *Tinker*

The Sixth Circuit's opinion acknowledged that the challenged regulation is content-based. App 40a. It also acknowledged that such a regulation must be narrowly tailored to serve a substantial government interest, citing *Mosley*. App. 46a, citing 408 U.S. at 101. However, it then rejected the narrow tailoring requirements of *Mosley*, concluding that, "The government interest in this case [is] the school's mission to educate its students in a learning environment conducive to fostering both knowledge and democratic responsibility." App. 46a. This broad government interest then led the Circuit Court to conclude that any regulation that meets *Tinker*'s forecast-of-disruption standard must automatically be narrowly tailored. *Id.*

By defining the government interest so broadly the Sixth Circuit apparently ignored the clear warning of Justices Alito and Kennedy that such a broad justification of censorship in the school setting would be rejected. 127 S.Ct at 2637.

A. "Educational Mission" as a Significant Government Interest

The *Mosley* Court noted the close link between Equal Protection and Free Speech rights, establishing that where speech restrictions are content-based they must be narrowly tailored. 408 U.S. at 100-101. Equal Protection becomes an issue

in content-based regulations because one topic is being treated differently than other topics, and because content-based regulations raise the specter of governmental suppression of particular ideas. *Id*; see also *R.A.V. v. St. Paul*,505 U.S. 377 (1992).

Because of these concerns, and to minimize them while still allowing necessary regulation of speech, the *Mosley* Court stated that where individualized analysis of potential disruption is possible, it is required. 408 U.S. at 100-101. It concluded that broad bans on entire categories of speech would be allowed *only* when no other possible restriction would fulfill the significant government interest being served. *Id*, citing *Tinker*, 393 U.S. at 508.

The Sixth Circuit distinguished *Mosley* from the present case by stating that *Mosley* involved adult speech in a public forum. App. 48a. While it is true that *Mosley* involved an adult school employee, and the speech at issue occurred on the sidewalk in front of the school, these distinctions do not negate the *Mosley* opinion's underlying purpose, nor that Court's extensive quotations and discussion of *Tinker*. The Sixth Circuit's distinctions certainly may affect the amount of tailoring required. However, nothing in *Mosley*, nor any other precedent that the petitioners have found, presumes that narrow tailoring of content-based regulations is completely unnecessary in the school setting.

The Sixth Circuit's opinion acknowledges the narrow tailoring requirement, but then effectively

eliminates it in practice by citing the broad "mission to educate its students" as the significant government interest being served. App. 46a. As discussed and rejected by Justices Alito and Kennedy, such a non-specific government interest allows school officials to define their educational mission in a way that permits official suppression of particular ideas. 127 S.Ct at 2637. This is exactly why the *Mosley* Court required an individualized analysis of likely disruption, where such individualized analysis is practical. 408 U.S. at 100-101. By endorsing the respondents' broad categorical restrictions on speech, the Sixth Circuit completely ignored the overarching concerns that the *Mosley* Court addressed, and it ignored the very specific warning of two sitting Supreme Court Justices. 127 S.Ct at 2637.

B. An Accurate Forecast of Disruption Does Not Eliminate the Necessity of Narrow Tailoring

The Sixth Circuit's endorsement of the "educational mission" as the government interest being protected led it to further erroneous conclusions. The Appellate Court's ruling establishes that school officials *automatically* fulfill the narrow tailoring requirement by simply meeting their initial burden under *Tinker*. App. 46a-47a. In other words, the Sixth Circuit has determined that if a school can show that a reasonable likelihood of disruption could be caused by a specific symbol, then all displays of that symbol can be justifiably banned.

This ruling grants school officials practically unfettered authority regarding the scope of speech restrictions. Such authority effectively eliminates the purpose underlying the First Amendment. Again, this is exactly the type of abuse Justices Alito and Kennedy warned about in their *Morse* concurrence. 127 S.Ct at 2637.

The Sixth Circuit's conclusion misunderstands the purpose of narrow tailoring, which is to allow speech restrictions that are necessary, but simultaneously minimize the scope of such restrictions as much as is practical. The Sixth Circuit's opinion fails to take into account that a regulation can be necessary to prevent disruption, and it can *also* prevent more speech than is necessary to prevent that disruption.

Tinker analyzed the constitutionality of a regulation directed at very specific symbolic displays as applied to specific students. Under those circumstances its forecast of disruption test is sufficient to stand alone because the regulation was already narrowly directed at specific circumstances. However, when assessing the constitutionality of broad categorical speech restrictions that are content-based, *Tinker*'s forecast-of-disruption test only determines whether a significant government interest exists. If a reasonable forecast is supported, then the second part of an equal protection analysis must still be performed. We must still ask: is the regulation broader than necessary to prevent the forecasted disruption? Rather than being mutually exclusive, as the Sixth Circuit presumed, this

interpretation shows that *Tinker* and *Mosley* overlap, support, and conform to each other.

In the present case dozens of displays of the Confederate flag were present in the school, despite the prohibition, yet none of these displays caused any disruption whatsoever. App. 12a; 73a. Also in the present case, the disruptive potential of other flags and symbolic displays are analyzed on an individualized basis, proving that *Mosley*'s suggested resolution is practical in the school setting.

The Sixth Circuit's current ruling allows broad categorical restrictions, enforced without regard to circumstances. App. 46a-47a. It creates a situation where school employees can testify that "Yes, I was certain that a particular student's display would not have caused any disruption, but I forced him to cover it anyway, because that is school policy."

C. Conflicting Circuit Opinions

Considering the fundamental errors in the Sixth Circuit's ruling, it is not surprising that other courts have ruled differently under similar circumstances. In *Hall v. Board of School Commissioners of Mobile County* the Fifth Circuit stated that *Tinker* requires "narrowly defined limitations" upon speech. 681 F.2d 965, (1982) (citing *Mosley*). While *Hall* involved speech rights of *teachers* in the school setting it did apply *Tinker* and *Mosley*. *Id* at 970-71. Conversely, the Sixth Circuit explicitly refused to apply *Mosley*'s individualized

analysis test because the Appellate Court concluded that *Tinker* eliminated the requirements of *Mosley*.

The *Hall* opinion shows how Equal Protection doctrine should be incorporated into *Tinker*. The *Hall* Court concluded, "Protection of the curriculum is a legitimate state interest; it may be accomplished, however, by means less intrusive on First Amendment rights than are [the policies at issue]. Without such a 'narrow tailoring' the policy is unconstitutional." *Id* at 972.

Two Circuits' recent establishment of a new standard regarding school speech illustrate just how far apart the circuits now stand regarding narrow tailoring of regulations justified pursuant to *Tinker*: Both the Fifth and Ninth Circuits recently established an "intermediate scrutiny" test for *content-neutral* speech restrictions in the school setting. *Canady v. Bossier Parish School Board*, 240 F.3d 437, 442-43 (5th Cir. 2001); *Jacobs v. Clark County School Dist.*, 526 F.3d 419, 434 (9th Cir. 2008). In doing so both Circuits discussed the higher standard presumed to exist within *Tinker*. The *Canady* Court stated:

> "The Supreme Court clearly thought it necessary to apply a higher standard of scrutiny to 'personal expression that happens to occur on the school premises,' as opposed to First Amendment activity sponsored by the school. The Court also held that a lower standard should apply when school restrictions of student expression are

'unrelated to any political viewpoint.'" *Canady*, 240 F.3d 437, 442-43.

Both the *Canady* and *Jacobs* Courts pointed out that *Tinker* applies to content-based regulations in the school setting. 240 F.3d 442-43; 526 F.3d 431, respectively. Both Courts agree that content-based regulations must be *more* narrowly tailored than content-neutral restrictions. *Id.* Both Courts then incorporated a weaker *O'Brien*-type narrow tailoring into their new "intermediate scrutiny" standards. *Id.* Both Circuits clearly described their new standard as being less rigorous than *Tinker*. *Id.* Both of these Courts presume, as they should, that *Tinker* incorporates a more stringent narrow tailoring than that found in *O'Brien*, or found in these Courts' new content-neutral school speech cases. *Id.* Yet the Sixth Circuit's ruling in the present case effectively eliminates *any* need for tailoring of speech restrictions once a reasonable forecast of disruption is found. App. 46a-47a.

An earlier Fifth Circuit case also applied *Tinker* and held that school authorities must protect student speech rights "unless they find the circumstances allow them *no practical alternative*." *Butts v. Dallas Independent School District*, 436 F.2d 728, 732 (1971)(emphasis added). While *Butts* does not use the term "narrow tailoring," its statement regarding no practical alternatives clearly shows that restrictions justified under *Tinker* must be as narrow as possible, while still fulfilling their legitimate purpose. In other words, the Fifth Circuit incorporated into a *Tinker* analysis what was to

become the *Mosley* standard. The Sixth Circuit has now explicitly refused to do the same.

Just four years ago a District Court in the Fifth Circuit applied an overbroad-type analysis to strike down a broad categorical prohibition against the Confederate flag. *Bragg v. Swanson*, 371 F.Supp.2d 814 (W.D. W.Vir. 2005) (Granting plaintiffs motion for preliminary injunction noting that "there are a variety of innocent flag uses that would be silenced by the broadly worded policy). While an overbroad analysis is more appropriate for facial challenges to content-neutral regulations, even this more government-deferential standard resulted in the *Bragg* Court striking down the untailored restriction in that case.[5] *Id.*

Clearly the present case, had it been presented to the Fifth Circuit, would have resulted in the respondents' policy being found unconstitutional for lack of narrow tailoring.

---

[5] Overbroad analysis is likely inappropriate in the present case not only because the challenged regulation is admittedly content-based, but also because the challenge is to the regulation as enforced, as opposed to a facial challenge. Despite these distinctions, however, a review of overbreadth challenges to school regulations reveals that courts are willing to find regulations that are broader than necessary to prevent disruption unconstitutional. *Newsom v. Albemarle County School Board*, 354 F.3d 249 (4th Cir. 2003); *Sypinewski*, 307 F.3d 243 (3rd Cir. 2002); *Bragg v. Swanson*, 371 F.Supp.2d 814 (W.D. W.Vir. 2005). Considering the very lenient *O'Brien*-type analysis used in overbreadth cases, this result supports the petitioners assertion that the present ruling is far outside of precedential norms.

D. Narrow Tailoring is Necessary to Prevent All-Encompassing Bans Based Upon Limited Justifications

If left standing, the Sixth Circuit's citation to the educational mission as a starting point for narrow tailoring will allow school officials to justify ever-broader, categorical restrictions by simply proving that their regulation was necessary at one point in time, or under specific circumstances. Such restrictions will then be applied to any student, under any circumstances, even when specific displays would clearly *not* cause a disruption. More importantly, the Sixth Circuit's ruling allows school officials unfettered discretion to suppress unpopular ideas through broad categorical restrictions that would otherwise be justifiable only for short periods of time or under specific circumstances.

This is not a hypothetical "slippery slope." The present case proves that this problem is real and current. The respondents admit that they intend to keep the current ban in place forever, absent a court order forcing them to repeal it. App. 125a-126a; 130a. The respondents admit that their ban is applied to all students, regardless of disciplinary history, and regardless of the circumstances presented on any particular day. App. 4a; 124a; 135a. Individual teachers and principals are told that they cannot make exceptions to the ban, even if they are certain that a given display will *not* cause disruption. The respondents go as far as admitting that they will continue to enforce the ban on the Confederate flag even if they were certain that it would not cause any disruption in the school. App. 130a. They also stated

that preventing offense is, by itself, sufficient justification for banning the Confederate flag.

The concerns presented by this case were not important to the Sixth Circuit precisely because it determined that the educational mission is more important than preventing government suppression of unpopular ideas. However, if more speech is being prohibited than is necessary to prevent disruption, then *Tinker* has not been satisfied, regardless of a legitimate forecast of disruption. *Hall*, 681 F.2d 965; *Newsom*, 354 F.3d 249; *Butts*, 436 F.2d 728; *Sipinewski*, 307 F.3d 243; *Bragg*, 371 F.Supp.2d 814; *Seidman*, 327 F.Supp.2d 1098; *Griggs v. Fort Wayne School Board*, 359 F.Supp.2d 731 (N.D.Ind. 2005). The Sixth Circuit's ruling stands inopposite to this well established and necessary doctrine.

II. Question 2: Irrebuttable Presumptions Based Upon the "Offensiveness" of a Symbol

By ignoring the underlying values established in this Court's First Amendment jurisprudence, and by deferring to political correctness, the Sixth Circuit converted this Court's *Tinker* decision into a license for school administrators to ignore students' rights by simply pointing to generalized "racial tensions" that arguably exist to some degree in every school in the country. App. 28a-29a; 46a-47a.

While it is true that a school need not wait until violence breaks out before limiting student speech, such preemptive action must be based upon "well founded expectation of disruption." *Saxe v.*

State Coll. Area Sch. Dist. , 240 F.3d 200, 212 (3rd Cir. 2001). As pointed out by Justices Alito and Kennedy in their *Morse* concurrence, the school must produce "concrete" evidence to support its forecast of future disruption. 127 S.Ct. 2637. The *Tinker* Court explicitly held that words which "may" cause a disturbance "must" be allowed, unless they "*would*" cause a disruption. 393 U.S. 508-9. This is *very* different than prohibiting speech because it *may* cause disruption. Unfortunately the Sixth Circuit's ruling takes the concept of reasonable preemptive actions by school officials beyond the limitations established in *Tinker*, extending the concept of preemptive actions to its extreme: an irrebuttable presumption that the Confederate flag will cause disruption in any racially tense environment.[6]

A. "Disruptive Potential" of the Confederate Flag Irrebuttably Presumed

The Circuit Court's opinion acknowledges the fact that no evidence in the current case links the Confederate flag to any disruptions in the school. App. 22a. It then cites evidence that racial tension was high in the school at issue, cites evidence that the Confederate flag is offensive to some students, and concludes that "to ban the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high." App. 29a.

---

[6] Presumptions are defined as assumed facts that require no evidentiary support. Irrebuttable presumptions are defined as presumptions that cannot be overcome by evidence. *Blacks Law Dictionary*, 7th Ed. 1203-4.

There are several presumptions in the Circuit Court's reasoning. First, it presumes that offended students will actually cause a disruption. Second, it presumes that such disruption is fairly certain to occur, as opposed to "may" occur. Third, it presumes that such disruptions will be substantial disruptions to school operations.

Petitioners acknowledge that presumptions are inevitable in any evaluation of evidence. Petitioners are not challenging here the District Court's conclusions regarding these presumptions, nor the Circuit Court's refusal to find error regarding those conclusions. Petitioners are, however, challenging the Circuit Court's establishment of an irrebuttable status for these multiple presumptions.

Because of its presumptions the Appellate Court completely ignored undisputed evidence that the banned symbol was present in the school at issue and had never caused any disruptions whatsoever. App. 12a; 73a. This refusal to consider such undisputed evidence, on review of summary judgment, raises all of the above-mentioned presumptions to the status of irrebuttable presumptions.[7]

This decision not only reverses the burden of proof established in *Tinker*, it actually allows courts and schools to ignore direct undisputed evidence

---

[7] Again, presumptions are defined as assumed facts that require no evidentiary support. Irrebuttable presumptions are defined as presumptions that cannot be overcome by evidence. *Blacks Law Dictionary* 7th Ed. 1203-4.

proving that the banned symbol does not, in fact, cause disruption. This decision allows school officials to cite generalized evidence of racial tension, which certainly exists to some degree in every school in the country, and then categorically ban the Confederate flag even where it has not and will not cause disruptions. Such precedent creates court-sanctioned discrimination against a particular symbol based upon its unpopularity. Such a broad precedent will certainly lead to even more egregious abuses.

B. "Collision with the Rights of Other Students"

The Circuit Court states that "Unlike in *Tinker*, Plaintiffs-Appellants' free-speech rights 'colli[de] with the rights of other students to be secure and to be let alone." App. 28a. However, no students' right to security or right to be let alone had ever been infringed by the petitioner's displays of the Confederate flag. App. 12a; 73a. The Circuit Court's offers no citation to evidence nor does it give any explanation of how it reached this critical legal conclusion. *See* App. 28a. This unsupported and unexplained conclusion inserted into the middle of the opinion reflects not only the effect of the Appellate Court's irrebuttable presumptions, but the source of those presumptions as well. It is clear from the context of the Circuit Court's opinion, including its focus on the Confederate flag's "offensiveness," that it has created a new right: the right to not be offended. App.27a-29a.

While the Sixth Circuit explicitly claims to reject a *Fraser*-style holding that the Confederate flag is "vulgar" or "plainly offensive," its wholesale endorsement of exactly those presumptions under a *Tinker* analysis creates the irrefutable presumption to which the petitioners respectfully request review. *Id.* Again, the petitioners acknowledge that the school setting creates special considerations for the protection of children, but the Sixth Circuit's ruling converts evidence of "offensiveness" to an irrebuttable presumption that the flag will cause disruption. This leap of reasoning, in the face of undisputed evidence to the contrary, goes much too far in overriding bedrock principals of First Amendment jurisprudence. *Texas v. Johnson*, 491 U.S. 397(1989).

C. Other Circuits Require Evidence Linking Past Disruptions to the Symbol Being Banned and the Students at Issue

The Sixth Circuit's ruling cites two cases in support of its assertion that the "disruptive potential of the flag" coupled with generalized racial tension conclusively support summary judgment for the school. App. 29a, (citing *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972); *West v. Derby Unified School Distr. No. 260*, 206 F.3d 1358 (10th Cir. 2000). However, both of the cases cited included evidence *directly linking* the Confederate flag to past disruptions. *Id* at 1333 and 1362-63, respectively. Petitioners can find no other circuit cases that hold

Tinker satisfied in the complete absence of evidence actually linking the speech being banned to the forecasted disruption.

The Third Circuit described the current state of precedent on this issue:

> "Several cases have addressed public schools' attempts to restrict displays of the Confederate flag under *Tinker*. Where there have been racial problems *involving the Confederate flag*, courts have found such bans constitutional. (Citations omitted). *In the absence of such evidence*, courts have concluded that school authorities have failed to establish a sufficient likelihood of disruption to support banning the flag." *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, (3rd Cir. 2002) (emphasis added).[8]

The conclusion that the symbol at issue must be linked to the forecasted disruption is derived from *Tinker*'s holding that "it would be obvious that the regulation would violate the constitutional rights of

---

[8] The Sixth Circuit's attempt to distinguish *Sypniewski* quotes the *Sypniewski* Court's discussion of the Confederate flag, but does not address the fact that in *Sypniewski*, as in *Melton* and *West*, the Confederate flag had been directly associated with past disruptions. *See* FN7 at App. 32a-33a. In fact, the quoted portions from *Sypniewski* are that Court's explanations making the point that in that case the Confederate flag had been the actual cause of past disruptions. 307 F.3d 243.

students, at least if it could not be justified by a showing that *the students*' activities would materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513. The Tinker Court was evaluating the activities of "the students" at issue, and the specific "activities" at issue. *Id.* Yet the Sixth Circuit's opinion eliminates the requirement such a specific evaluation.

The Sixth Circuit's ruling effectively codifies a conclusion that the Confederate flag can *only* represent racism, and that in a racially tense environment such a racist symbol will conclusively lead to disruption, every time. This conclusion can now be presumed in all cases dealing with the Confederate flag.

Such presumptions have been rejected by other courts:

> "To suggest a ban is warranted simply because some associate [the Confederate flag] with racism proves too much for First Amendment purposes...Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect. (citations omitted) Repressing this kind of discussion would be as unreasonable, and hopefully unthinkable, as a rule that forbids students to discuss the Constitution of the United States on the basis that it recognized slavery or [a regulation that] forbids the display of the American flag because it has

been carried by hate groups." *Bragg v. Swanson*, 371 F.Supp.2d 814, 829 (W.Dist. W.Vir. 2005).

The Third Circuit's decision in *Sypniewski*, explicitly acknowledges a school's right to preemptively ban the Confederate flag, but then notes that past cases invoking this right all include a history of racial problems *linked directly to* the Confederate flag. 307 F.3d 243, 254. The *Sypniewski* Court then stated that facts in its case also linked the Confederate flag to past disruptions in the plaintiff's school, but that no evidence linked the plaintiff's "redneck" shirt to *any* disruption at his school. *Id* at 255. This lack of a link between the banned display and past disruptions led the Third Circuit to rule that the school's preemptive restriction was unconstitutional due to a lack of evidence linking the banned subject matter to the forecast of disruption:

> "Where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well founded fear of genuine disruption in the form of substantially interfering with school operations." *Id* at 257.

The Sixth Circuit's "disruptive potential" of the Confederate flag is no more than a "general

association" that is supported by no evidence, and is refuted by undisputed evidence.

Still other courts have held that high tension in a school regarding a particular subject is a factor to consider, but does not eliminate the requirement to link prohibited symbols to evidence justifying a forecast of disruption. *Griggs v. Fort Wayne School Board*, 359 F.Supp.2d 731 (N.D.Ind. 2005). In *Griggs*, a recent murder of a student led to high tension and disturbances between the victim's family and the murderer's family. Based on this, the school board instituted broad prohibitions related to images of guns on student clothing. The Northern District of Indiana granted a student's motion for summary judgment against the school board, explaining that no evidence linked the plaintiff's shirt to any disruptions. The Court stated that the school "cannot merely incant 'Columbine' or '[the murder victim's name]' like a magic spell allowing it to ban speech totally unrelated to those tragic incidents." *Id* at 746.

Similarly, schools should not be allowed to ban the Confederate flag by merely incanting "racism" and pointing to "racial tension" completely unrelated to any display of the flag.

III. Use of the Heckler's Veto to Justify Speech Restrictions Under *Tinker*

It is well established that the heckler's veto may not be used to justify restrictions on speech. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Forsyth County v. Nationalist Movement*, 505 U.S.

123, 134 (1992); *Center for Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dept.*, 533 F.3d 780 (9th Cir. 2008). However, it is not clear to what extent this prohibition applies in the school setting. This Court's decision in *Tinker* can be read to allow consideration of a heckler's veto in justifying restrictions on student speech. 393 U.S. 503. However, it is not clear whether that was the *Tinker* Court's intent. As pointed out by the Chief Judge of the Sixth Circuit, this uncertainty has led to widely inconsistent outcomes regarding the use of student offense to justify speech restrictions. App. 70a. This uncertainty creates unnecessary litigation and potential conflicts between circuits.

A. Endorsement of the Heckler's Veto in Any Forum Weakens the Bedrock Principals of the First Amendment

The Sixth Circuit's ruling in the present case cautions that:

> "our decision today does not establish a precedent justifying a school's ban on student speech merely because other students find that speech offensive: we simply hold that the school's dress code as applied to ban the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high..." App. 29a. , citing *Texas v. Johnson*, 491 U.S. 397(1989).

In other words, students merely being offended is not enough to make the ban

constitutional, but if those offended students initiate a disruption, the ban is constitutional. This is a classic example of the "heckler's veto."[9]

The present case represents one end of the spectrum on this issue, while other courts have strongly implied that they will not consider a listener's negative response to speech as a justification for restrictions, even in the school setting. *Butts v. Dallas Indep. School Dist.*, 436 F.2d 728, 731 (5th Cir. 1971)(Finding unconstitutional school officials prohibition of demonstration because the officials were concerned about reactions of students opposing a demonstration, not about the demonstrators themselves).

While it was discussing the establishment clause, the Seventh Circuit's discussion in *Hedges v. Wauconda Community Unit School District No. 118* is instructive: "The school's proper response is to educate the audience rather than squelch the speaker...Far better to teach them about the first amendment...about why we tolerate divergent views...School districts seeking an easy way out try to suppress private speech." 9 F.3d 1295, 1299 (1993).

The Ninth Circuit rejected the notion that a heckler's veto is somehow more acceptable as a basis

---

[9] The term "heckler's veto" first appeared in a footnote in *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). It is used to describe restrictions on speech that stem from listeners' negative reactions to a particular message.

for speech restrictions simply because the hecklers are students:

> "There is, however, no precedent for a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its content. It would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children." *Center for Bio-Ethical Reform, Inc. v. L.A. County Sheriff Department*, 533 F.3d 780, 790 (9th Cir. 2008).[10]

The petitioners respectfully submit that allowing wholesale incorporation of the heckler's veto into *Tinker* would violate bedrock principals of the First Amendment. As explained by the Seventh Circuit, government has a duty to protect a speaker against the negative reactions of a crowd, caused by the unpopularity of the speaker's viewpoint. *Hedges*, 9 F.3d at 1299. "The police must permit the speech and control the crowd; there is no heckler's veto." *Id.* This governmental duty to protect a speaker from an offended crowd arises in the world at large despite the difficulties associated with protecting the speaker in a relatively uncontrolled public forum. By comparison schools are relatively controlled, secure, and safe environments where students traditionally have been encouraged to explore ideas and change

---

[10] While *Tinker* was not applied, the hecklers were students in school that were offended by anti-abortion displays outside the school. *Center*, 533 F.3d 780.

their minds if a stronger argument prevails. The government's duty to protect the speaker should be higher in the school setting, not lower.

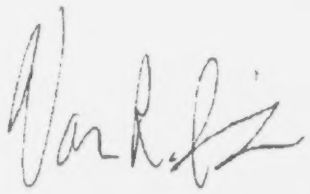
In justifying the ban against the Confederate flag the Sixth Circuit cites the school's responsibility to protect students "rights to be secure and let alone." App. 28a. Yet the Appellate Court apparently forgot that this responsibility also extends to protecting students who wish to silently express their political views from students who are offended by those views. Certainly if the *only* way to protect a student speaker is to silence their speech, then that may be a justifiable balance between individual rights and educational mission. But where the resources exist to protect the speaking student, bedrock principals of the First Amendment require the school to protect that student speaker. *Texas v. Johnson*, 491 U.S. 397(1989).

Again, this issue is directly related to narrow tailoring and the degree of deference given to schools in forecasting disruption. Petitioners agree that school administrators have a responsibility to advance the educational mission. But that mission includes protecting the rights of the peaceful student-speakers when possible. It includes limiting censorship to circumstances where it is absolutely necessary. It includes teaching students appropriate responses to ideas they find offensive. It includes all these things because schools have a responsibility to teach our children that the First Amendment is more than a "mere platitude."

CONCLUSION

For the reasons discussed above the request for a writ of certiorari should be granted.

Respectfully submitted,



Van R. Irion
Law Office of Van R. Irion
9040 Executive Park Drive
Suite 223
Knoxville, TN 37923
(865) 809-1505
Attorney for Petitioners

APPENDIX

Part A

Sixth Circuit Opinion Affirming District Court's Grant of Defendants' Motion for Summary Judgment, August 20, 2008

538 F.3d 554

United States Court of Appeals,

Sixth Circuit.

Derek BARR; Roger Craig White and Chris White, by and through their parent and guardian Roger White, Plaintiffs-Appellants,

v.

Steve LAFON, in his individual and official capacity as Principal of William Blount High School; Alvin Hord, in his official capacity as Director of Schools; and The Blount County School Board, Defendants-Appellees.

No. 07-5743.

Argued: April 22, 2008.

Decided and Filed: Aug. 20, 2008.

Background: High school students brought action against school principal, director of county schools, and county school board, alleging that prohibition on wearing clothing depicting the Confederate flag at school violated their rights to free speech, equal protection, and due process. The United States District Court for the Eastern District of Tennessee, Thomas A. Varlan, J., granted summary judgment to defendants, and students appealed.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

(1) school officials reasonably forecast that clothing displaying Confederate flag would disrupt schoolwork and school discipline;

(2) ban on disruptive speech did not constitute viewpoint discrimination; and

(3) ban on clothing displaying racially divisive symbols did not violate students' right to equal protection.

Affirmed.

*556 ARGUED: Van R. Irion, Law Offices of Van R. Irion, Knoxville, Tennessee, for Appellants. LaJuana G. Atkins, Crawford, Crawford & Newton, Maryville, Tennessee, for Appellees. ON BRIEF: Van R. Irion, Law Offices of Van R. Irion, Knoxville, Tennessee, for Appellants. LaJuana G. Atkins, Norman H. Newton, Jr., Crawford, Crawford & Newton, Maryville, Tennessee, Robert N. Goddard, Goddard & Gamble, Maryville, Tennessee, Gary M. Prince, O'Neil, Parker & Williamson, Knoxville, Tennessee, for Appellees.

Before: MOORE and CLAY, Circuit Judges; SCHWARZER, District Judge. FN*

FN* The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Derek Barr, Roger Craig White, and Chris Nicole White ("Plaintiffs-Appellants"), students at William Blount High School ("the school") in Blount County, Tennessee, would like to express their southern heritage by wearing clothing depicting the Confederate flag at school. They appeal the district court's grant of summary judgment to the principal of their school, Steven Lafon ("Lafon"), the director of the Blount County schools, Alvin Hord ("Hord"), and the Blount County School Board FN1 on their First Amendment, Equal Protection Clause, and Due Process Clause claims. FN1.

I. FACTS AND PROCEDURE

A. Factual Background

1. Written Dress Code

The Blount County Board of Education issued a dress code on December 4, 2003 in recognition of "the effect that student dress and grooming have upon student behavior and learning." Joint Appendix ("J.A.") at 155 (Hord Aff. Ex. 1 at 1). Among other prohibitions, the dress code bars middle-and high-school students from wearing during the school day:

clothing which exhibits written, pictorial, or implied references to illegal substances, drugs or alcohol,

---

FN1. Plaintiffs-Appellants brought suit against Lafon in his individual and official capacities. Plaintiffs-Appellants brought suit against Hord only in his official capacity. Defendants-Appellees are collectively referred to as "the Board" throughout the opinion.

negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that *557 depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation....

J.A. at 156 (Hord Aff. Ex. 1 at ¶ 4(f)) (emphasis added). On the first day of the 2005-2006 school year, in keeping with school policy, students attended a meeting at which they received a "[p]lanner" containing an agenda and school rules. Students' home-room teachers reviewed the planner with them, and the school asked both parents and students to sign a page of the planner indicating that they had read the policy. J.A. at 102 (Lafon Dep. at 26:19-27:7).

2. Announcement of the Ban on Clothing Displaying the Confederate Flag

At an assembly for the freshman class in August 2005, Principal Lafon told the class that "they would not be allowed to have Rebel flags or symbols of [the] Rebel flag on their clothing, or anything else that was a disruption to the school." J.A. at 102 (Lafon Dep. at 28:10-12). Lafon testified at his deposition that he did not mention any other flags as similarly banned because there were not "any other flags at that point that were causing disruption or that we knew had caused a disruption in the previous year." J.A. at 102 (Lafon Dep. at 28:17-23). Lafon told the students that "in general ... anything that is a disruption to the school learning environment would not be tolerated." J.A. at 103 (Lafon Dep. at 29:5-9).

3. Rationale for the Ban on the Confederate Flag and Racially Divisive Symbols

According to Hord, racial tensions at the school comprised the context for the clothing ban. Relevant incidents included racist graffiti that made general threats against the lives of African-Americans, graffiti containing "hit lists" of specific students' names, physical altercations between African-American and white students, and a police lockdown at the school. J.A. at 53-54 (Hord Aff. 3/10/06 at ¶¶ 3-4); J.A. at 111, 113-14, 115-16 (Hord Dep. at 17-18, 25-31, 36-39). Hord attests that "[b]ased upon the aforementioned incidents, the wearing of the 'Confederate flag' by students during school hours has a significant disruptive effect on the proper educational environment of the students at the Blount County high school." J.A. at 54 (Hord Aff. 3/10/06 at ¶ 5). Of the approximately 1,750 students attending the school, less than ten percent are African-American. J.A. at 153 (Hord Aff. 4/3/07 at ¶ 10).

a. February 22, 2005 Altercation and other Altercations

Both sides in the instant case cite an incident that occurred on February 22, 2005 as the catalyst of heightened racial tension in the school. Barr recounted his observation of the incident. According to Barr, the incident involved a physical altercation at a basketball game in the gym, between an African-American student (whose name Barr did not know) and a Caucasian student named J.H. J.A. at 235 (Barr Dep. at 8:12-20). Barr did not remember

exactly what the argument was about. J.A. at 235 (Barr Dep. at 8:21-23). Barr indicated that a third "racist" white student named C.P. "didn't like what the African-American kid was saying, and they got into it." J.A. at 235-36 (Barr Dep. at 8:24-9:3). The African-American student rounded up a group of friends, and Barr joined a "couple of other kids ... because [J.H.] was our friend and we didn't want to see him getting jumped by anybody." J.A. at 236 (Barr Dep. at 9:3-9). Before a physical altercation began, "the teachers and everybody got down there and split them up and everything like that and told them to go to class. And *558 from then on there was a tight racist thing going on in the school." J.A. at 236 (Barr Dep. at 9:10-13). Barr testified that by "tight racist thing," he meant that the African-American students "tried to find anything they could to get" Caucasian students "in trouble." J.A. at 236 (Barr Dep. at 9:15-20).

The incident resulted in the parent of the African-American student involved in the February 22 altercation, whom the school suspended, filing a complaint with the Office of Civil Rights ("OCR") at the Department of Education alleging that the complainant's son received harsher discipline than a white student who did not receive a suspension. J.A. at 111 (Hord Dep. at 17-18); J.A. at 289 (OCR Letter at 1). OCR investigated the incident and concluded "that the witnesses did not substantiate the allegations that Student # 2 [a Caucasian student] engaged in fighting. All witnesses stated that Student # 2 had not pulled back when Student # 1 pushed him into the bleachers." J.A. at 291 (OCR Letter at 3).FN2 Furthermore, OCR concluded

although "[t]he complainant reported that the two [Caucasian] HHS students threatened, used racial slurs or intimidating conduct (noose gestures) against [her son, African-American] Student # 1 [,] ... that allegation was not corroborated by witnesses." Id.

In addition to the February 22 incident, Hord attests that the school experienced "multiple racially motivated threats and physical altercations," but Hord does not specifically describe other physical altercations. J.A. at 53 (Hord Aff. 3/10/06 at ¶ 3(b)). Hord mentioned at his deposition an incident in January 2005 involving a mixed-race step team that he believed contributed to racial tensions at the school. J.A. at 111 (17:7-16).

b. Racist Graffiti and "Hit Lists"

In the spring of 2005, the school experienced multiple incidents of racist graffiti and graffiti containing "hit lists" with students' names. On March 23, 2005, School Resource Officer and Deputy

---

FN2. The OCR report states that Student # 2 attended Heritage High School and not William Blount High School. J.A. at 289 (OCR Letter at 1). Both Heritage and William Blount High Schools, however, lie within the Blount County School District and both are subject to the district's policies regarding discrimination and harassment. J.A. at 290 (OCR Letter at 2). OCR did not find material to its investigation the fact that students # 1 and # 2 attended different high schools. Moreover, it is possible that OCR received misinformation from William Blount High School regarding which high school Student # 2 attended. Barr's testimony at deposition implies that all students involved in the February 22 altercation attended William Blount High School. JA. at 70-71 (Barr. Dep. at 8:4-9:22).

Sheriff Joe Crisp investigated graffiti in the girls' restroom after an Assistant Principal at the school contacted him. J.A. at 183 (Crisp Aff. at ¶ 2). He did not take pictures because the custodians had painted over the graffiti before he arrived; however, he filed an incident report with the Sheriff's Office. J.A. at 183 (Crisp Aff. at ¶ 2). According to his report, the Assistant Principal told him that the phrase "all niggers must die" was accompanied by a list with future victims' names. J.A. at 188 (Incident Report).

Another incident involving racist graffiti occurred on April 1, 2005; the principal of the school contacted Crisp to ask him to investigate racial remarks on a restroom stall. J.A. at 183 (Crisp Aff. at ¶ 3). Crisp took pictures, J.A. at 377-384 (Photographs), and filed an incident report. J.A. at 183 (Crisp Aff. at ¶ 3); J.A. at 191 (Incident Report). Four days later, on April 5, 2005, Crisp took photographs of graffiti in a boys' restroom, J.A. at 202; the graffiti stated: "All niggers will still *559 die on 4-13-05 [.] It's time for a new revolution[.] KKK." J.A. at 184 (Crisp Aff. at ¶ 4); J.A. at 386 (Crisp Aff. Ex. 4). Deputy Sheriff Andy Waters took photographs of the graffiti in a boys restroom in the vocational wing of the school. J.A. at 392-411 (Photographs); J.A. at 206 (Investigative Report). The graffiti included the scrawled statements: "The South Will Rise Again," J.A. at 398-99 (Waters Aff. Ex. 2), and "Niggers 'Hang em,'" written above a drawing of a noose next to the Confederate flag. J.A. at 404-09 (Waters Aff. Ex. 2).

The graffiti included a "hit list" with students' names. J.A. at 113-14 (Hord Dep. at 25-31); J.A. at 367 (Crisp Aff. at ¶ 2); J.A. at 369-72 (Crisp Aff. Ex.

1). Hord testified that he was not certain whether all the names on the list were those of minority students. J.A. at 114 (Hord Dep. at 29). Deputy Sheriff David Henderson stated in his report that the graffiti threatened "rednecks" as well as African-Americans. J.A. at 231 (Henderson Report). Plaintiff-Appellant Barr testified that the list was on paper and was shown to various students. J.A. at 238 (Barr Dep. at 11:19-24). Barr testified that "it wasn't just Caucasian kids doing it." J.A. at 238 (Barr Dep. at 11:7-8). He testified that he knew "a lot" of the people on the list, some Caucasian and some African-American. J.A. at 239 (Barr Dep. at 12:2-7).

c. Lockdown

After a meeting with representatives from the Sheriff's Department and an FBI agent, Hord decided to implement a lockdown at the school in early April 2005 FN3 to "be proactive" and "show that the school [was] secure and it [was] safe and we [were] interested in keeping it that way." J.A. at 54 (Hord Aff. 3/10/06 at ¶ 4); J.A. at 115 (Hord Dep. at 36:20-22); J.A. at 117-18 (Hord Dep. at 44:24-45:2) (reiterating the need to demonstrate that the school was safe and free of guns). Hord pointed out that there had been "threats to bring guns, to hang people, to do all of this stuff. I had been accused by some people of not taking this serious[ly]." J.A. at 115 (Hord Dep. at 36:17-19). One parent Hord remembered in particular, John Cleveland, called Hord because his daughter had been called racially

---

FN3. Lafon was a teacher at the school at this time; he assumed the principalship in the summer of 2005. J.A. at 97 (Lafon Dep. at 6:18-20); J.A. at 120 (Hord Dep. at 53:21-25).

derogatory names, threatened because of her race, and "exposed to being taunted by the [Rebel] flag or something to that nature." J.A. at 116 (Hord Dep. at 40:4-7, 20). Hord was concerned about violence. J.A. at 116 (Hord Dep. at 37:15-16).

The Sheriff's Office "maintained a continued presence," J.A. at 228 (Henderson Aff. at ¶ 3), at the school on April 7-8, 2005. The office assigned "approximately 40-50 officers" "to secure" the high school and "investigate racial incidents." J.A. at 228 (Henderson Aff. at ¶ 3). Officer Waters "checked purses and backpacks at the school entrance as part of the security assigned" to the school. J.A. at 204 (Waters Aff. at ¶ 3). "The investigation did not reveal any suspects for the graffiti, racial threats [,] or racial slurs." J.A. at 184 (Crisp Aff. at ¶ 5). One student, J.H., "was charged and delivered to the Blount County Juvenile Detention Center after he admitted that he stated that he and his friends were going to bring a gun to school and kill all African American students and other people they did not like." J.A. at 184 (Crisp Aff. at ¶ 5).

*560 d. Hord's Conclusions Regarding the Disruptive Effect of the Confederate Flag

Hord attests that in making the decision to ban the Confederate flag and other "racially divisive symbols," he "relied upon numerous conversations with students and parents of students which revealed that students were taunted by the Confederate flag and were fearful for their safety as

a result of the racial tensions at William Blount High School." J.A. at 152 (Hord Aff. 4/3/07 at ¶ 5). Hord further attests that "[t]he parents' and the students' fears were evidenced by a dramatic increase in absenteeism during the time of racial tension prior to the lockdown and the ban." Id.

Hord characterized the Confederate flag as both offensive and disruptive: "I think when that offense becomes something that you have to deal with day-in and day-out [ ] it is disruptive to what our normal process is, yes." J.A. at 115 (Hord Dep. at 34:6-8); see also J.A. at 112 (Hord Dep. at 21:7-16). Hord believed that student offense as a result of the flag would lead to disruption. J.A. at 122-23 (Hord Dep. at 64:18-65:2). Hord stated that he was not banning the Confederate flag because it was a "racist symbol": he based the continued ban on the events that began in January 2005 and information that he continues to gain

that says to me, when you have it, you have disruption, you have-you have interference with the learning process. And you have hurt feelings and you have people that are offended and it is something that we have to deal with. My primary purpose is to take us forward instructionally and that prohibits that and you're worried about the insecurity and safety and all of those things rather than the instruction process.

J.A. at 115 (Hord Dep. at 33:5-16). Lafon believed that were the ban lifted, the Confederate flag "would be a source of confrontation and a symbol that would

cause unrest with the student body." J.A. at 99 (Lafon Dep. at 14: 19-20). Lafon also believed that the presence of the flag would lead to racially motivated physical altercations. J.A. at 99 (Lafon Dep. at 14:23-24). Hord, however, stated in his deposition that he intended "at this point" to keep the ban in place, even if appearances of the Confederate flag (despite the ban) did not cause disruption. J.A. at 121 (Hord Dep. at 59:9-60:10).

4. Enforcement of the Ban on Racially Divisive Symbols

According to Lafon, between August 2005 and March 2006, the school witnessed "over 452 documented violations of the dress code policy ... twenty-three (23) of which involved the wearing of the 'Confederate flag' by students." J.A. at 51 (Lafon Aff. at ¶ 4). Plaintiff-Appellant Barr declares:

On or about September 1, 2005, to express pride in my southern heritage, I wore a T-shirt to school bearing a small image of the Confederate flag, a picture of two dogs, and the words "Guarding our Southern Heritage" on the back. I was confronted by Defendant Lafon. Prior to my encounter with Mr. Lafon, no student or teacher had commented on my shirt that day. I was informed by Mr. Lafon that items displaying the Confederate flag were banned at William Blount High School. Defendant Lafon informed me that I had to turn the shirt inside out or take it off. Lafon informed me that if I refused to remove the shirt I would be suspended from school.

J.A. at 26-27 (Barr Decl. at ¶ 4). Plaintiff-Appellant Chris White declares that she "wore a shirt with an

image of the *561 Confederate flag to school" in January 2006. J.A. at 24 (Chris White Decl. at ¶ 4).FN4 A teacher told Chris White "that the shirt violated school policy because of the image of the flag." J.A. at 24-25 (Chris White Decl. at ¶ 4). The teacher told Chris White "to cover the shirt with a jacket for the rest of the day or return home and be suspended." J.A. at 25 (Chris White Decl. at ¶ 4). We note that the declarations of Derek Barr and Chris White contained in the joint appendix are unsigned.

B. Procedural Background

On February 21, 2007, a panel of this court affirmed the district court's denial of Plaintiffs-Appellants' motion for a preliminary injunction in an unpublished opinion. D.B. ex rel. Brogdon v. Lafon, 217 Fed.Appx. 518 (6th Cir.2007) (unpublished) (per curiam). Plaintiffs-Appellants filed a motion for summary judgment as to their Equal Protection Clause claim on February 10, 2007. The Board filed a motion for summary judgment on April 5, 2007. In an oral ruling on May 24, 2007, the district court denied Plaintiffs-Appellants' motion for summary judgment and granted the Board's motion, which it treated as addressing all of the claims in the

---

FN4. The declaration is titled "Declaration of C.W." We assume that the declaration is by Plaintiff-Appellant Chris Nicole White and not Plaintiff-Appellant Roger Craig White because the declaration in one sentence refers to the author of the declaration in the third person, rather than the first person, using the pronoun "she." J.A. at 25 (Chris White Decl. at ¶ 4). In addition, the caption for the district court opinion in this case referred to Plaintiffs-Appellants as D.B., R.W., and C.W. We therefore deduce that R.W. referred to Roger Craig White and C.W. to Chris Nicole White. J.A. at 45 (5/31/2007 Order).

Complaint (First Amendment, Equal Protection, and Due Process). J.A. at 33-44. The district court formally entered judgment in a one-page order on May 31, 2007, dismissing the case with prejudice.

II. ANALYSIS

A. Standard of Review

We review de novo the district court's grant of summary judgment to the school. Clay v. United Parcel Serv., Inc., 501 F.3d 695, 700 (6th Cir.2007) (citing Wright v. Murray Guard, Inc., 455 F.3d 702, 706 (6th Cir.2006)). Summary judgment for the school is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In contrast, "[s]ummary judgment is inappropriate when the evidence raises a genuine issue about a material fact, 'that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " Wright, 455 F.3d at 706 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). We "view all evidence in the light most favorable to the nonmoving party." Clay, 501 F.3d at 701. We must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52, 106 S.Ct. 2505. We do not "weigh the evidence and determine the truth of the matter but [rather we] determine whether there is a genuine issue for trial." May v. Franklin County Comm'rs,

437 F.3d 579, 583 (6th Cir.2006) (quoting Anderson, 477 U.S. at 249, 106 S.Ct. 2505). "[T]here can be 'no genuine issue as to any material fact' " when the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at *562 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Plaintiffs-Appellants also appeal the district court's denial of their motion for summary judgment. "Although the denial of a motion for summary judgment is usually an interlocutory order that is not immediately appealable, where 'an appeal from a denial of summary judgment is presented in tandem with a grant of summary judgment, this court has jurisdiction to review the propriety of the district court's denial of summary judgment.' " Tenn. ex rel. Wireless Income Props., LLC v. City of Chattanooga, 403 F.3d 392, 395 (6th Cir.2005) (quotations omitted). Because the district court denied Plaintiffs-Appellants' motion for summary judgment " 'on purely legal grounds' ... [and not] based on the finding of a genuine issue of material fact," we review the district court's denial de novo. Id. at 395-96 (quoting McMullen v. Meijer, Inc., 355 F.3d 485, 489 (6th Cir.2004)). We review de novo decisions on mixed questions of law and fact. Wolfe v. Perry, 412 F.3d 707, 716 (6th Cir.2005).

B. Plaintiffs-Appellants' First Amendment Claim

1. Precedent Relevant to Student Speech in Public Schools

Plaintiffs-Appellants' claims lead us to wrestle with a most difficult question: how to balance some students' rights to free speech with "the rights of other students to be secure and to be let alone," Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), taking into account the authority of school officials to maintain the discipline and learning environment necessary to accomplish the school's educational mission. The district court granted the Board's motion for summary judgment on Plaintiffs-Appellants' First Amendment and Equal Protection claims because the Confederate flag did not need to have caused a disruption in the past in order for school officials to ban it when (1) there were racially motivated incidents at the school that caused tension among the student body and (2) such a ban was not implemented in a viewpoint-discriminatory manner. J.A. at 35 (Tr. at 92:17-23); J.A. at 38 (Tr. at 95:6-9); J.A. at 41 (Tr. at 98:3-14). We affirm the district court's grant of summary judgment to the Board.

The Supreme Court has made "clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " Morse v. Frederick, --- U.S. ----, 127 S.Ct. 2618, 2622, 168 L.Ed.2d 290 (2007) (quoting Tinker, 393 U.S. at 506, 89 S.Ct. 733). "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and courts must apply the rights of students "in light

of the special characteristics of the school environment." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting Tinker, 393 U.S. at 506, 89 S.Ct. 733).

In Tinker, the Court considered whether a public school district violated high-school and junior-high-school students' First Amendment rights when the district suspended students who had worn black armbands to school as an expression of their opposition to the Vietnam War. The school had implemented a ban on the wearing of armbands after learning of some students' plans to protest the war by wearing black armbands during the holiday season in December 1965. The Court determined that because "the wearing of armbands ... was entirely divorced from actually or *563 potentially disruptive conduct by those participating in it," the wearing of the armbands "was closely akin to 'pure speech.' " Tinker, 393 U.S. at 505-06, 89 S.Ct. 733. The Court also determined that there existed no evidence that the suspended students' protest interfered "with the rights of other students to be secure and to be let alone" and, accordingly, that the case did "not concern speech or action that intrude [d] upon the work of the schools or the rights of other students." Id. at 508, 89 S.Ct. 733. The Court concluded that the school's ban on armbands was motivated by "an urgent wish to avoid the controversy which might result from the expression." Id. at 510, 89 S.Ct. 733. Because of the absence of "evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or

impinge upon the rights of other students," the Court reversed the en banc court of appeals decision below affirming the district court's dismissal of the plaintiffs-students' complaint. Id. at 509, 514, 89 S.Ct. 733.

In two subsequent cases, the Court qualified when the Tinker standard should be applied and clarified that schools did not in every situation need to justify regulation of student speech on the basis that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker, 393 U.S. at 509, 89 S.Ct. 733 (quotation omitted). In Bethel School District No. 403 v. Fraser, the Court considered whether a public high school infringed upon a student's free-speech rights when the school suspended the student for violating a school policy that prohibited "the use of obscene, profane language or gestures." 478 U.S. at 678, 106 S.Ct. 3159. The suspended student had given a speech at a school-sponsored assembly, in support of another student's candidacy for elective office, which employed "an elaborate, graphic, and explicit sexual metaphor." Id. at 677-78, 106 S.Ct. 3159. The Court noted "[t]he marked distinction between the political 'message' of the armbands in Tinker and the sexual content of the respondent's speech in [Fraser]," id. at 680, and observed that prior Court decisions had allowed limitations on speech in the interest of protecting children, especially those in captive audiences, from sexually explicit, vulgar, and offensive spoken language. Id. at 684, 106 S.Ct. 3159. Accordingly, the Court held that "schools, as instruments of the state, may determine that the essential lessons of civil,

mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as ... Fraser's ... plainly offensive [speech.]" Id. at 683, 106 S.Ct. 3159.

Hazelwood School District v. Kuhlmeier involved a suit brought by former staff members of a high-school newspaper who argued that the school principal violated their First Amendment rights when he deleted two pages of the newspaper containing articles discussing students' experiences of pregnancy and the effect of divorce on students. The Court concluded that because the school lent its name and resources to the newspaper, the Tinker standard did not apply to the case. Hazelwood, 484 U.S. at 272-73, 108 S.Ct. 562. The Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Id. at 273, 108 S.Ct. 562.

The above trilogy of cases yields three principles: (1) under Fraser, a school may categorically prohibit vulgar, lewd, indecent,*564 or plainly offensive student speech,FN5 Fraser, 478 U.S. at 683-85, 106 S.Ct. 3159; Hazelwood, 484 U.S. at 272 n. 4, 108 S.Ct. 562; (2) under Hazelwood, a school has limited

---

FN5. "Plainly offensive" speech, proscribable under Fraser, "should not be read to encompass any speech that could fit under some definition of 'offensive,' ... [as] much political and religious speech might be perceived as offensive to some." Morse, 127 S.Ct. at 2629.

authority to censor school-sponsored student speech in a manner consistent with pedagogical concerns, 484 U.S. at 273, 108 S.Ct. 562; and (3) the Tinker standard applies to all other student speech and allows regulation only when the school reasonably believes that the speech will substantially and materially interfere with schoolwork or discipline, 393 U.S. at 513, 89 S.Ct. 733. Guiles, 461 F.3d at 325; Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176-77 (9th Cir.2006), vacated on other grounds, --- U.S. ----, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir.2001); see also Castorina ex rel. Rewt v. Madison County Sch. Bd., 246 F.3d 536, 540 (6th Cir.2001).

Tinker governs the instant case because by wearing clothing depicting images of the Confederate flag students engage in pure speech not sponsored by the school. Castorina, 246 F.3d at 539-40. Hazelwood does not apply to the instant case "because no one would reasonably believe that [Plaintiffs-Appellants' clothing] bore the school's imprimatur." Morse, 127 S.Ct. at 2627. Therefore, our inquiry in this case is whether the ban on clothing depicting the Confederate flag "is necessary to avoid material and substantial interference with schoolwork or discipline." Tinker, 393 U.S. at 511, 89 S.Ct. 733.

The Court's most recent student-speech case, Morse v. Frederick, does not modify our application of the Tinker standard to the instant case. Morse affirmed that "schools may regulate some speech even though

the government could not censor similar speech outside the school" and that the rule stated in Tinker "is not the only basis for restricting student speech." 127 S.Ct. at 2627 (internal quotation omitted). The Morse decision, however, resulted in a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school "reasonably view[s] as promoting illegal drug use." Id. at 2629. Justice Alito's concurrence states that he joins the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." Id. at 2636 (Alito, J., concurring). Justice Alito also makes clear that he joins the majority only insofar as "the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions" beyond those articulated in Tinker, Fraser, and Hazelwood. Id. at 2637.

2. Analysis under Tinker of the Ban on Clothing Depicting the Confederate Flag

As an initial matter, we must consider Plaintiffs-Appellants' argument that much of the evidence presented by the Board, and relied upon by the district court, was hearsay. Plaintiffs-Appellants Br. at 33-37; Reply Br. at 17-21. As the Board notes, however, Plaintiffs-Appellants do not specify in their brief which evidence they consider to be hearsay; rather, Plaintiffs-Appellants refer us to documents filed at the district court level. *565 Plaintiffs-

Appellants Br. at 33 n. 6. Well-established law in this Circuit holds that "a party is not allowed to incorporate by reference into its appellate brief the documents and pleadings filed in the district court." Thomas M. Cooley Law Sch. v. Am. Bar Ass'n, 459 F.3d 705, 710 (6th Cir.2006) (citing Northland Ins. Co. v. Stewart Title Guar. Co., 327 F.3d 448, 452 (6th Cir.2003)), cert. denied, --- U.S. ---- 127 S.Ct. 985, 166 L.Ed.2d 710 (2007). Therefore, we are left with only Plaintiffs-Appellants' allegation that "[m]ost of the defendants' evidence in the case at bar consists of hearsay statements that were [inappropriately] considered 'for its[ ] effect upon the listener.' " Plaintiffs-Appellants Br. at 34. Because Plaintiffs-Appellants do not specify to which pieces of evidence they are referring, we have no basis upon which to conclude that the district court abused its discretion when it found that "in the record before the Court many of the declarants do, in fact, testify as to occurrences and incidents of which they have personal knowledge as that term would be defined and understood pursuant to the Federal Rules of Evidence." J.A. 39 (5/24/07 Hr'g Tr. at 96:19-22). See United States v. Khalil, 279 F.3d 358, 363 (6th Cir.2002) (holding that "all evidentiary rulings of the district court, including its determination of whether testimony is inadmissible hearsay, are reviewed for abuse of discretion").

Plaintiffs-Appellants argue that there is no evidence "that the Confederate flag ever caused any disruption at the school," even when worn by students during the ban. Plaintiffs-Appellants Br. at 28. Plaintiffs-Appellants' contention that the Confederate flag itself had to cause disruption in the

past for the school to justify the ban, however, "misapplies the Tinker standard." Lowery v. Euverard, 497 F.3d 584, 591 (6th Cir.2007). " Tinker does not require disruption to have actually occurred." Id. at 593. Rather than evaluating competing claims about whether disruption occurred in the past, we "must evaluate the circumstances to determine if [the school's] forecast of substantial disruption was reasonable." Id. The rationale for this standard lies in the fact that requiring evidence of disruption caused by the banned speech would place "school officials ... between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation." Id. at 596. "Recognizing that the Tinker decision does not require that the banned form of expression itself actually have been the source of past disruptions, subsequent appellate court decisions considering school bans on expression have focused on whether the banned conduct would likely trigger disturbances such as those experienced in the past." Brogdon, 217 Fed.Appx. at 525 (citing Castorina, 246 F.3d at 542; Melton v. Young, 465 F.2d 1332 (6th Cir.1972), cert. denied, 411 U.S. 951, 93 S.Ct. 1926, 36 L.Ed.2d 414 (1973)). Our inquiry, then, is whether the school reasonably forecast that the Confederate flag would cause material and substantial disruption to schoolwork and school discipline.

Plaintiffs-Appellants further challenge the alleged high level of racial tension at the school, no matter the cause. In particular, Plaintiffs-Appellants allege that "[t]he racial graffiti referred to by the defendants as proof of 'racial tension' actually caused absolutely no disruptions, implying that racial

tension is not as high as claimed." Plaintiffs-Appellants Br. at 29. Were Plaintiffs-Appellants correct and the record showed minimal evidence of prior disruption related to racial tension, then we would likely conclude that the school had little basis for anticipating disruption caused by images of the Confederate flag. *566 But the evidence on the record belies Plaintiffs-Appellants' argument.

In deposing Hord, the attorney for Plaintiffs-Appellants tried to show that racist graffiti had not specifically caused disruption. When asked if he knew if any classes had been disrupted as a result of the graffiti, Hord stated that "[t]he only disruption I think it does have is that just by the fact that a Principal and teachers if they have those kids they are pulling kids out questioning them there, they are trying to get to the bottom of it. So in that sense it is a disruption, but I don't know specifically here is the class, here is the kids, that kind of thing." J.A. at 114 (Hord Dep. at 31:15-21). Hord stated that he did not know whether any fights resulted from the graffiti or "hit lists." J.A. at 114 (Hord Dep. at 31:3-12). We are wary of concluding, however, that the racist graffiti had to cause violent disruption to the school for the school reasonably to forecast that images of the Confederate flag would cause disruption within the meaning of Tinker. There is no requirement that disruption under Tinker be violent. Hord presents uncontested testimony that investigation of the graffiti disrupted classes. Furthermore, the racist graffiti was violent in character: the graffiti contained examples of the most demeaning racial slurs, accompanied by threats against the lives of African-Americans generally, an image of a noose

next to that of a Confederate flag, and "hit lists" containing specific students' names. One might plausibly argue that such racist graffiti containing violent threats is inherently disruptive to a school environment. We do not need to reach such a conclusion today, however, because Hord presented evidence that the racist graffiti including the hit lists produced secondary disruptions. "There was a lot of school disruption because of the hit lists, parents coming to school, parents calling me, calling the administrator, calling people in the Central office and it was time consuming." J.A. at 114 (Hord Dep. at 30:24-31:2). Hord also gave unrefuted deposition testimony that fear of racial violence caused an increase in absenteeism among African-American students, the epitome of disruption in the educational process.

Perhaps the most compelling evidence of the racial tension that existed at the school immediately prior to the clothing ban comes from Plaintiffs-Appellants' own deposition testimony. Barr stated that he felt "friction" and "racially related tension" in the school in the spring of 2005. J.A. at 240 (Barr Dep. at 13:11, 13). He said he could "feel the intensity" as "people walk[ed] by." J.A. at 240 (13:8-9). Craig White, another student bringing this suit, conceded in his deposition that his Confederate flag clothing could "create disruptive behavior" at school if others found his clothing "offensive." J.A. at 261 (R. Craig White Dep. at 8:11-14).

The instant case can be distinguished from Tinker. In Tinker there were no facts in the record that would "reasonably have led school authorities to

forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred" as a result of students wearing black armbands in protest of the Vietnam War. 393 U.S. at 514, 89 S.Ct. 733. The facts in this case, however, even when viewed in a light most favorable to Plaintiffs-Appellants, indicate that school officials could reasonably forecast that permitting students to wear clothing depicting the Confederate flag would cause disruptions to the school environment. In contrast to the dearth of evidence on the record in Tinker, the record in the instant case contains evidence of racial violence, threats, and tensions: a fight between an African-American and a white student on *567 February 22; FN6 a complaint filed with OCR alleging that following a racially motivated altercation, the school punished an African-American student more harshly than a white student in the district was punished; racist graffiti containing racial slurs and generalized threats against the lives of African-Americans; "hit lists" containing student names; unspecified race-related physical fights during the 2004-2005 school year; a fear-motivated increase in absenteeism among

---

FN6. Although the record does not make clear whether the fight occurred between a student who was attending William Blount High School and a student who was attending Heritage High School or between two William Blount students, there is no doubt that the fight occurred at William Blount High School. We therefore determine that in the context of other evidence of racial tensions at the school, the fight supports the school's reasonable forecast that students wearing clothing with the Confederate flag would disrupt the educational process.

African-American students; and a school "lockdown" in April 2005 that the school implemented because of a breakdown in student discipline and the threat of race-related violence. Notably, a particularly egregious example of racist graffiti depicted the Confederate flag next to a drawing of a noose, just below a general threat to the lives of African-Americans that contained a racial slur. J.A. at 406-09 (Waters Aff. Ex. 2). That graffiti exemplifies how school officials reasonably concluded that the connection between the symbolism of the Confederate flag and racial tensions at the school meant that the Confederate flag would likely have a disruptive effect on the school. Under Tinker, we hold that the school reasonably forecast that clothing bearing images of the Confederate flag would disrupt schoolwork and school discipline.

We do not find persuasive Plaintiffs-Appellants' argument that the Board has "repeatedly admitted that prevention of disruption is not [its] only motive." Appellant Br. at 27. Hord acknowledges that the disruption he anticipates arising from displays of the Confederate flag directly correlates with the offense the flag poses to some students. Hord stated at deposition: "I think when that offense becomes something that you have to deal with day-in and day-out [then] it is disruptive to what our normal process is, yes." J.A. at 115 (Hord Dep. at 34: 6-8). That Hord determined the Confederate flag to be offensive to African-American and other students, however, does not negate his reasonable belief that the flag was also disruptive and would cause substantial and

material interference with schoolwork and school discipline. This is not a case in which the school acted upon "undifferentiated fear or apprehension of disturbance." Tinker, 393 U.S. at 508, 89 S.Ct. 733. The school did not merely find the Confederate flag offensive to some students but rather found that in a context of high racial tensions, race-related altercations, and threats of violence, the flag would disrupt the school's educational process.

That there exists a relationship between the offensiveness of the Confederate flag, in the eyes of some students, and its disruptive potential does not change our holding. We note that our decision evinces greater sensitivity to the effect of the regulated speech on its student audience than that ordinarily accorded to the targets of speech in our general First Amendment jurisprudence. First Amendment standards applicable to student speech in public schools, however, are unique, and courts accord more weight in the school setting to the educational authority of the school in attending to all students' psychological and developmental *568 needs. Unlike in Tinker, Plaintiffs-Appellants' free-speech rights "colli[de] with the rights of other students to be secure and to be let alone." Tinker, 393 U.S. at 508, 89 S.Ct. 733. The fact of this collision would almost certainly not be enough to justify government regulation of the speech, if the parties in this case were adults in a public forum. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533,

105 L.Ed.2d 342 (1989) (holding that prosecution of defendant for burning an American flag during a protest rally violated the defendant's right to free expression under the First Amendment). We caution, however, that our decision today does not establish a precedent justifying a school's ban on student speech merely because other students find that speech offensive: we simply hold that the school's dress code as applied to ban the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high and serious racially motivated incidents, such as physical altercations or threats of violence, have occurred.

Our holding that the school in the circumstances of this case reasonably forecast the disruptive effect of the Confederate flag accords with precedent in our circuit as well as our sister circuits. In Melton v. Young, 465 F.2d 1332 (6th Cir.1972), cert. denied, 411 U.S. 951, 93 S.Ct. 1926, 36 L.Ed.2d 414 (1973), we held that the suspension of a student for violating a high-school code of conduct banning displays of the Confederate flag and the Confederate soldier, as well as the song "Dixie," did not violate the student's rights under the First or Fourteenth Amendments. Evidence on the record showed that during the 1969-1970 academic year, the school that implemented the ban had become "racially polarized as a result of continuing controversy over the use of the Confederate flag and the song Dixie at various school functions." Id. at 1333. Racial tension in the school disrupted classes and led school authorities "to call for police assistance amid several confrontations and also to close the school for the purpose of restoring order and calming tensions." Id. The evidence in

Melton supporting the school's rationale for the ban is, in two respects, stronger than that in the instant case: past disruptive conflict in the school had centered on the Confederate flag and disruption had led authorities not only to "lockdown" the school but to actually close it. Nevertheless, as we noted above, " Tinker does not require school officials to wait until the horse has left the barn before closing the door." Lowery, 497 F.3d at 591-92. In another sense, despite the fact that the displays of the Confederate flag did not themselves apparently instigate racial conflict, the evidence supporting the ban in the instant case is stronger than in Melton because racial tension had produced physical confrontations and threats against students' lives. In sum, the holding in Melton supports our decision that a school may reasonably forecast that the Confederate flag would cause substantial and material disruption of a school when the school had recently experienced intense racial conflict.

Furthermore, the record in the instant case closely parallels that in West v. Derby Unified School District No. 260, 206 F.3d 1358 (10th Cir.2000). In West, a middle-school assistant principal had suspended a student who had drawn a Confederate flag on a sheet of paper during a class, in violation of a school's racial-harassment policy that prohibited students from possessing written material "that is racially divisive or creates ill will or hatred." *569 Id. at 1361. The policy listed the Confederate flag as an example of the banned material. Id. In the three years prior to the incident, the school at issue had experienced "verbal confrontations ... between black and white students"; white students wearing clothing

depicting the Confederate flag and black students wearing clothing invoking the ideology of Malcolm X; the circulation of racist materials among students by non-student members of the Aryan Nation and Ku Klux Klan; "graffiti stating such things as 'KKK' (Ku Klux Klan), 'KKKK' (Ku Klux Klan Killer), and 'Die Nigger' "; "reports of racial incidents on school buses and at football games"; and "[a]t least one fight ... as a result of a student wearing a Confederate flag headband." Id. at 1362. The Tenth Circuit concluded that "[t]he evidence ... reveals that based upon recent events, [the school district] officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone." Id. at 1366.

Just as in West, in the instant case the school based its clothing ban on the existence of racial tension, threatening graffiti, reports of racially motivated confrontations, and at least one fight. The only potentially significant difference between the records in the two cases is that the February 22, 2005 fight in the instant case did not involve an image of the Confederate flag. Given binding precedent in the Sixth Circuit interpreting Tinker, however, we do not think any difference between the record in the instant case and that in West is significant enough to distinguish West. Indeed, we find West consistent with our decision in Melton and, therefore, consider West to constitute persuasive precedent.FN7

FN7. The Eleventh Circuit has upheld school districts' bans on the display of the Confederate flag under both Tinker and Fraser. Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir.), cert. denied, 540 U.S. 824, 124 S.Ct. 156, 157 L.Ed.2d 46 (2003); White v. Nichols, No. 02-01712-CV-P-NE, 2006 WL 1594213, at *2 (11th Cir. June 12, 2006); see also Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1275-78 (11th Cir.) (affirming the dismissal of plaintiff students' 42 U.S.C. § 1983 claim against school administrators in their individual capacities because it was not clearly established that the school would violate students' First Amendment rights by banning the Confederate flag and affirming the dismissal of § 1983 claims against the school because plaintiffs had not created a genuine issue of material fact that school administrators possessed final decision-making authority or that a custom or practice of banning the Confederate flag existed), cert. denied, 531 U.S. 958, 121 S.Ct. 382, 148 L.Ed.2d 295 (2000). Although the Eleventh Circuit's decisions do not conflict with our holding today, we decline to consider these decisions persuasive precedent because we disagree that a display of the Confederate flag constitutes vulgar or "plainly offensive" speech under Fraser, 478 U.S. at 683, 106 S.Ct. 3159. Rather, the display of the Confederate flag by a student constitutes political speech that is protected under the First Amendment and may only be regulated if a school meets the Tinker standard.

The Third Circuit's decision in Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 (3d Cir.2002), cert. denied, 538 U.S. 1033, 123 S.Ct. 2077, 155 L.Ed.2d 1062 (2003), is readily distinguishable. In Sypniewski, the Third Circuit considered a challenge to the application of a racial-harassment policy, analogous to that at issue in West, to ban a T-shirt featuring a joke by comedian Jeff Foxworthy giving the "Top 10 reasons you might be a Redneck Sports Fan." Id. at 249-50. The Third Circuit reversed a district court decision denying the plaintiff students a preliminary injunction against the policy as enforced to ban the Foxworthy T-shirt. In finding that the plaintiffs had a likelihood of success regarding their claim that

*570 3. Alleged Viewpoint Discrimination

Plaintiffs-Appellants argue that the ban on clothing depicting racially divisive symbols, and specifically the ban on the Confederate flag, discriminates on the basis of viewpoint and unconstitutionally suppresses particular ideas. Plaintiffs-Appellants Br. at 19-26. In Tinker, the Supreme Court rested its holding striking down the defendant school's ban on armbands on the finding that "the action of the school authorities appear[ed] to have been based upon an urgent wish to avoid the controversy which

---

the as-applied ban violated their rights under the First Amendment, the Third Circuit distinguished Sypniewski from cases including West and Melton that upheld the ban on the Confederate flag: "Plaintiffs have not challenged a ban on the Confederate flag; they challenge the banning of a T-shirt that bore no Confederate flag and had no similarly disruptive history." Id. at 254. The Sypniewski opinion explained: "There is no suggestion in the record that any part of the Confederate flag clothing other than the flag itself was seen as a provocative and offensive symbol. In short, there is little if any history of the use of the word 'redneck' itself that would support its ban." Id. at 256.

A final Fifth Circuit decision regarding the Confederate flag in public schools similarly does not conflict with our holding but is inapplicable because of its distinct procedural history. In Augustus v. School Board of Escambia County, 507 F.2d 152, 158 (5th Cir.1975), the Fifth Circuit held that a district court had the authority categorically to ban the use of the Confederate flag as a symbol in a school, if necessary to implement a court order to desegregate the school. The Fifth Circuit further held, however, that the school had overstepped its authority in implementing a categorical ban without determining "whether an injunction against the misuse of flags and symbols would be preferable to a complete prohibition." Id. at 158-59.

might result from the expression" rather than from reasonable "anticipat[ion] that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students." Id. at 509-10, 89 S.Ct. 733. The Court proceeded to observe in dicta, however, that its decision also reflected the Court's concern "that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance." Id. at 510, 89 S.Ct. 733. There existed evidence that some students at the school wore buttons related to political campaigns as well as the Iron Cross, a Nazi symbol, and that the school did not ban these symbols. Id. at 510-11, 89 S.Ct. 733. Significantly, the Court in Tinker did not hold that a viewpoint-discriminatory rule in the schools would necessarily be unconstitutional; such a rule would still be constitutional if it met the disruption standard outlined in the opinion. Specifically, the Court concluded its paragraph discussing the viewpoint-discriminatory character of the ban on armbands with the following statement: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." Id. at 511, 89 S.Ct. 733 (emphasis added).

Our precedent interpreting the status of viewpoint-discriminatory school rules under Tinker is complicated. The code of conduct at issue in Melton explicitly prohibited images of the Confederate flag, the Confederate soldier, and the song "Dixie." 465 F.2d at 1333-34. The code did not prohibit symbols

that might have been similarly controversial at a newly integrated public high school during the time-period in question: the late 1960s and early 1970s. Id. Thus, one could characterize the ban at issue in Melton as viewpoint discriminatory because it prohibited symbols that some people might perceive as celebrating Southern heritage, or even white supremacy, but did not prohibit symbols perceived as celebrating the North's defeat of the South in the Civil War, racial equality, or black power. We upheld the ban, however, regardless of any viewpoint discrimination because it met the disruption standard set forth in Tinker. *571 Melton, 465 F.2d at 1335. Indeed, the Melton opinion does not address any argument by the plaintiffs in that case regarding viewpoint discrimination.

A subsequent Sixth Circuit decision, Castorina v. Madison County School Board, took the view that "even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on [some] racially sensitive symbols and not others." 246 F.3d at 544. Castorina reversed and remanded a district court's grant of summary judgment to a defendant school board because the plaintiff students had created a genuine issue of material fact regarding whether the school banned clothing with images of the Confederate flag but did not ban the wearing of clothing with images of or allusions to "Malcolm X and the Black Muslim movement." Id. at 541. The statement in Castorina that a viewpoint-discriminatory clothing ban would be unconstitutional is in tension with our decision in Melton upholding the constitutionality of such a ban

under Tinker's substantial-and-material-disruption standard.

Although one panel of this circuit cannot overrule a prior panel, Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir.1985); 6TH CIR. R. 206(c), an intervening Supreme Court decision gave the Castorina panel authority to modify the holding in Melton. The Castorina panel based its holding regarding the unconstitutionality of viewpoint-discriminatory clothing bans on Tinker and two other Supreme Court decisions: Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), decided two months before our decision in Melton, and Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 828-29, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), decided over a decade after Melton. Castorina, 246 F.3d at 542. To the extent that Castorina rested its holding on Rosenberger, decided after Melton, the Castorina panel had the authority to modify the Melton panel's interpretation of Tinker. In Rosenberger, the Court considered a university's denial of student-activity funds to a student newspaper that would otherwise be eligible for funds but for the fact that the newspaper "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 825-27, 115 S.Ct. 2510. The Court held that because the University had opened the student-activity funds as a limited public forum (in a conceptual rather than spatial sense), the University could not discriminate on the basis of viewpoint. Id. at 828-30, 115 S.Ct. 2510. Therefore, once the University allowed the disbursement of funds to groups discussing religion

as a subject matter, the university could not deny funds to "those student journalistic efforts with religious editorial viewpoints." Id. at 831, 837, 115 S.Ct. 2510. Castorina applied the principles set forth in Rosenberger to the high-school setting, holding that schools' regulation of student speech must be consistent with both the Tinker standard and Rosenberger's prohibition on viewpoint discrimination. Accordingly, we cannot affirm the grant of summary judgment to the school if Plaintiffs-Appellants have created a genuine issue of material fact that the school implemented the clothing ban in a viewpoint-discriminatory manner.

Plaintiffs-Appellants argue that the school engages in viewpoint discrimination by banning racially divisive symbols but not racially inclusive symbols. Plaintiffs-Appellants Br. at 19-22. The Board argues that it enforces a facially neutral ban on racially divisive symbols in a nondiscriminatory manner. Defendant-Appellee *572 Br. at 34. In Rosenberger, the Supreme Court illuminated the often imprecise distinction between content-based and viewpoint-discriminatory restrictions on speech. "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510. "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set." Id. "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' ... nor may it discriminate against speech on the basis of its viewpoint." Id. (quotation omitted).

Thus, the Court "observe [s] a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." Id. at 829-30, 115 S.Ct. 2510.

The two sides in this litigation have presented competing paradigms for what we should view as constituting content-based and viewpoint-based regulations on speech, in the circumstances of this case. Plaintiffs-Appellants suggest that the school may restrict student speech regarding race as a general topic, but may not ban racially divisive speech while allowing racially inclusive speech. By contrast, the school suggests that the restriction on racially divisive clothing is a permissible content-based restriction and that our inquiry should be whether the clothing ban is enforced in a viewpoint-discriminatory manner.

We agree with the school. As an initial matter, Plaintiffs-Appellants' suggested definition of "content" in this case is so abstract as to approach absurdity. Considering the salience of race to our nation's history and contemporary political and social debates, any public school would seriously hamper its ability to foster thoughtful and responsible citizens by prohibiting all student speech and expression about any topic dealing with race. Moreover, we find Plaintiffs-Appellants' effort to redefine "content" and "viewpoint" to be a red herring. In R.A. V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Supreme

Court explained that a blanket ban on the use of "odious racial epithets" by "proponents of all views" constitutes mere content-based regulation, while a ban on the use of racial slurs by one group of speakers but not "those speakers' opponents" constitutes viewpoint-discrimination. Id. at 391, 112 S.Ct. 2538. Applying this distinction to the instant case, it is clear that the school's ban on disruptive speech does not engage in viewpoint discrimination. The school bans all symbols which "cause[ ] disruption to the educational process," regardless of whether the disruption arises because of a student's racial animus, or for another reason entirely. J.A. at 156 (Hord Aff. Ex. 1 at ¶ 4(f)). Indeed, based on the record in this case, there is no evidence that the ban on disruptive symbols would not have been applied equally to a student displaying a Confederate flag in solidarity with hate groups, and another who displayed a Confederate flag in a circle with a line drawn through it. Thus, there is no indication that the school permits "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." R.A.V., 505 U.S. at 392, 112 S.Ct. 2538. Both proponents of racial tolerance and proponents of racial hatred are forbidden to display the Confederate flag.

*573 Furthermore, although the restriction on racially intolerant but not racially tolerant messages may be unconstitutional as applied to adults acting in a public forum, R.A.V., 505 U.S. at 391-94, 112 S.Ct. 2538, the same is not true in the public schools. "Public education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values in themselves conducive

to happiness and as indispensable to the practice of self-government in the community and the nation." Fraser, 478 U.S. at 681, 106 S.Ct. 3159 (quoting C. Beard & M. Beard, New Basic History of The United States 228 (1968)). Given the extensive Supreme Court precedent affirming the unique mission of public education and holding that the free-speech rights of public-school students are not coextensive with those of adults, we believe that the exclusion of racially divisive symbols in a school that has experienced intense racial tensions is a permissible content-based restriction. The critical question, therefore, is whether the school has enforced its facially neutral, written dress code banning racially divisive symbols in a viewpoint-discriminatory manner.

Plaintiff-Appellant Barr stated that it was not until after the "hit list incidents" that the school began enforcing a ban on clothing depicting the Confederate flag, and prior to that time Barr had worn such clothing. J.A. at 243 (Barr Dep. at 16:11-19). Hord confirmed this understanding of the dress code's enforcement. J.A. at 110 (Hord Dep. at 13:6-21) (noting that the policy was not really enforced until the "hit lists" appeared on the restroom walls and the "racial graffiti, threats, complaints from parents, [and] a lot of racial tension.").FN8 That the school only began rigorously to enforce the dress code

---

FN8. Hord added that sporting events and after-school activities were an exception. J.A. at 116 (Hord Dep. at 38:25-39:5). In those environments, "the flag has not been banned because of the magnitude of being able to ban it." J.A. at 116 (Hord Dep. at 39:1-5).

following the "hit lists," however, does not mean it did so in a viewpoint-discriminatory manner. Lafon attests that he has complied with Hord's direction "to apply the provisions of the dress code evenly without viewpoint discrimination." J.A. at 51 (Lafon Aff. at ¶ 4).

The school specifically identified the Confederate flag as subject to enforcement as a violation of the dress code, but also intended the ban to apply to other racially divisive symbols that could reasonably be expected to cause disruption in the school. Hord attests: "In banning racially divisive symbols, I specifically included the Confederate [f]lag because it had been disruptive; however, the Principal of William Blount High School was instructed to ban any racially divisive symbols or flags that caused disruption or was likely to cause disruption." J.A. at 153 (Hord Aff. 4/3/07 at ¶ 8); see also J.A. at 110 (Hord Dep. at 15:12-18); J.A. at 98 (Lafon Dep. at 9: 11-17). While the school has specifically and explicitly banned the Confederate flag as a result of racial tension in the schools, J.A. at 110 (Hord Dep. at 14: 15-19), the school has not yet done so with respect to other political symbols because of an alleged absence of necessity. In other words, the school alleges that because other symbols have not yet caused a disruption, they have not been explicitly banned. J.A. at 110 (Hord Dep. at 14:24-15:4). Thus, Hord attests that he expects Lafon to enforce a ban on any other flag " [i]f it became disruptive and it proved to be." J.A. at 110 (Hord Dep. at 15:8)

(emphasis added). Hord reiterated at deposition that under the policy, Lafon would enforce a ban against any flag that "became disruptive and offensive to a group to the point *574 [at which] it was disruptive." J.A. at 122 (Hord Dep. at 62:13-15). Thus, for example, while the school does not currently ban the Canadian flag, "[i]f it became disruptive, if there is someone there that had a deep conceded problem with the Canadian flag and [would] fight you over it, it would become something that we [would] need to deal with." J.A. at 122 (Hord Dep. at 63:12-15). Plaintiffs-Appellants have produced no evidence suggesting that the school did not have a policy of applying the ban to all disruptive, racially divisive symbols and not just the Confederate flag.

On the one hand, the evidence on the record that the school has explicitly and prospectively banned the Confederate flag but has not done the same with respect to other symbols supports Plaintiffs-Appellants' argument that the enforcement of the dress code is viewpoint discriminatory. The evidence is uncontested that at the opening assembly of the 2005-2006 school year, Lafon announced only that the dress code's prohibition applied to the Confederate flag and did not specifically cite any other flags or symbols as similarly prohibited. In Castorina, we held that the First Amendment prohibited not only the kind of "formally targeted ban" present in Tinker but also "a facially neutral policy that is enforced ... in a content-specific manner." Castorina, 246 F.3d at 542. One could argue that the school's announcement that the Confederate flag fell within the dress code's prohibition chilled the expression of students who

desired to wear emblems of the Confederate flag, whereas students desiring to wear racially divisive symbols other than the Confederate flag were free to test the boundaries of the dress code. Those students' speech would be censored only after they wore a divisive symbol and not prospectively. Ultimately, however, we decline to hold that the fact of Lafon's announcement regarding the Confederate flag alone demonstrates that the school enforces the ban on racially divisive symbols in a viewpoint-discriminatory manner. The school required all students to take home a planner containing a copy of the school rules, including the dress code's ban on racially divisive symbols, and to have their parents sign a page of the planner attesting that the students had read it. J.A. at 102 (Lafon Dep at 27:3-7). Lafon's announcement that the Confederate flag lay within the scope of the ban did not narrow its breadth but rather clarified that the ban covered at least one symbol that students had previously worn on their clothing. We cannot require that, every time a school official explains a policy restricting students' speech, the official must offer a comprehensive list of the applications of the policy so as to avoid a finding that the official enforced the policy in a viewpoint-discriminatory manner.

Were there evidence that the school in practice enforced the dress code against the Confederate flag but not against other racially divisive symbols, we would need to reverse the grant of summary judgment for the school. But Plaintiffs-Appellants have produced no more than "a scintilla of evidence" that the school fails to enforce the dress code against racially divisive symbols other than the Confederate

flag. Anderson, 477 U.S. at 252, 106 S.Ct. 2505. Both parties construe Malcolm X iconography as the ideological counterpoint to the Confederate flag, and thus we would have to reverse the grant of summary judgment were there evidence on the record that the school failed to enforce the dress code to prohibit clothing with Malcolm X iconography. In contrast to Castorina, 246 F.3d at 541-42, in which there existed a genuine issue of material fact regarding whether the school refused to ban apparel celebrating Malcolm X, there is no similar issue of fact in the instant case. Lafon attests that *575 other flags and symbols would fall under the ban "if they are disruptive .... a Malcolm X shirt or some national flag, Mexican flag might possibly be, different things from that standpoint that whatever would cause a disruption." J.A. at 101 (Lafon Dep. at 22: 20, 22-25). Lafon attests, however, that "[t]here have been no reported incidents of students wearing clothing emblazoned with Malcolm X words or caricatures, or international flags." J.A. at 51 (Lafon Aff. at ¶ 4).

Plaintiffs-Appellants have not produced evidence disputing Lafon's testimony that would create a genuine issue of material fact regarding discriminatory enforcement of the dress code. Barr declares in his affidavit that he has seen other students wear clothing depicting Malcolm X and national flags during the 2005-2006 school year. J.A. at 27 (Barr Aff. at ¶ 9). Barr's declaration in the joint appendix is not signed. Furthermore, Barr stated at deposition that when he saw students, "[o]nce or twice," wearing clothing like a Malcolm X shirt, he

told "teachers" and "it came to a stop." FN9. Barr affirmed that, as far as he knew, the same penalties for wearing Confederate flag clothing applied to wearing the other types of potentially disruptive clothing and he "never saw it enforced any differently." J.A. at 248 (Barr Dep. at 41:8-12).FN10 Chris White's declaration states that "[o]n several occasions during the 2005-2006 school year [she] ha[d] seen other students ... wear clothing that depicted foreign national flags, Malcolm X symbols, and political slogans." J.A. at 25 (C.W. Decl. at ¶ 9). Chris White testified at deposition, however, that she was not aware of students wearing Malcolm X clothing, and was "not really sure" whether she had seen students wearing national flags on their clothing but thought she had seen "Canadian flags and Mexican flags." J.A. at 255-56 (Chris White Dep. at 9:20-10:1). Chris White's declaration in the joint appendix is neither dated nor signed, and thus we cannot consider the declaration to create a factual issue when it contradicts her own deposition testimony. See Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 (6th Cir.1986). Lastly, Craig White

---

FN9. At some point in time (it is not clear from the record), Barr asked students to sign a petition "requesting that the students be allowed to wear Confederate clothing." J.A. at 244 (Barr Dep. at 22:20-23). It is not clear what happened to the petition, or whether it was presented to any school authority.

FN10. Later in his testimony, however, Barr stated that he "didn't like [sic] actually see [students] disciplined" for wearing Malcolm X clothing. J.A. at 297 (Barr Dep. at 56:5-6). That Barr did not see the students disciplined, however, does not negate the fact that he was aware of school policy enforcing the dress code against the wearing of clothing celebrating Malcolm X.

also testified at deposition that he wasn't aware of students wearing Malcolm X clothing or foreign national flags. J.A. at 260 (R. Craig White Dep. at 7:7-15). Thus, Plaintiffs-Appellants have not created a genuine issue of material fact that the school enforced the dress code's prohibitions against the Confederate flag but not against clothing with Malcolm X iconography. Accordingly, under Tinker and its progeny in the Sixth Circuit- Melton and Castorina-we affirm the district court's grant of summary judgment to the school with respect to Plaintiffs-Appellants' First Amendment claim.

C. Plaintiffs-Appellants' Equal Protection Claim

In the circumstances of this case, our analysis of Plaintiffs-Appellants' Equal Protection claim is essentially the same as our analysis of Plaintiffs-Appellants' First Amendment claim. See *576 R.A.V., 505 U.S. at 384 n. 4, 112 S.Ct. 2538 (noting that the Supreme "Court itself has occasionally fused the First Amendment into the Equal Protection Clause ... with the acknowledgment ... that the First Amendment underlies its analysis"). Because the distinction between the wearing of racially divisive and racially inclusive symbols pertains to "expressive conduct within the protection of the First Amendment," this provision of the school's dress code "must be [narrowly] tailored to serve a substantial governmental interest." Mosley, 408 U.S. at 99, 101, 92 S.Ct. 2286. The government interest in this case-the school's mission to educate its students in a learning environment conducive to fostering both knowledge and democratic responsibility-is undeniably a substantial one. The question of whether the dress code's ban on racially divisive

symbols is narrowly tailored to that purpose asks us to inquire whether the ban meets the standard set forth in Tinker. As we have demonstrated above, the evidence on the record establishes that the school enforces the dress code in a viewpoint-neutral manner to ban those racially divisive symbols that the school reasonably forecasts will substantially and materially disrupt schoolwork and school discipline. We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the state and the school's substantial interest in educating students, and we affirm the district court's grant of summary judgment to Defendants-Appellees on Plaintiffs-Appellants' Equal Protection claim.

We reject Plaintiffs-Appellants' argument that the instant case is analogous to the Supreme Court's decision in Police Department of City of Chicago v. Mosley. In Mosley, the Court invalidated a city ordinance that placed geographic and temporal restrictions on picketing outside a school but exempted peaceful labor picketing. 408 U.S. at 92-94, 92 S.Ct. 2286. The Court concluded that the ordinance's content-based restriction on speech could be upheld only if necessary to serve a substantial government interest in a narrowly tailored manner. Id. at 98-99, 92 S.Ct. 2286. The Court further determined that the ordinance was not narrowly tailored to the city's "interest in preventing disruption by the ... excesses of some nonlabor picketing" because it targeted "both peaceful and violent [nonlabor] picketing." Id. at 101-02, 92 S.Ct. 2286. The school argues that Mosley is not applicable because it involved a challenge to a facially discriminatory rather than a facially neutral

regulation on speech. But that is not the critical distinction between the cases; as stated above, we apply strict scrutiny under the Equal Protection Clause to a statute infringing on speech protected by the First Amendment, whether plaintiffs bring a facial or as-applied challenge. The dispositive distinction between Mosley and the instant case is that Mosley involved adult speech in a public forum, while the instant case involves student speech in a public school, which is a limited public forum. Thus, Tinker sets the guiding standard for the instant case while that was not true of Mosley.

Plaintiffs-Appellants argue that under Mosley, the school needs to show that the Confederate flag is "clearly more disruptive" than other flags. Plaintiffs-Appellants Br. at 16 (quoting Mosley, 408 U.S. at 100, 92 S.Ct. 2286). Plaintiffs-Appellants argue further that the determination must be made on an individualized basis. Plaintiffs-Appellants Br. at 16-18. These arguments do not advance our resolution of Plaintiffs-Appellants' Equal Protection claim. By complying with the Tinker standard, the school has already shown that the Confederate flag and other racially divisive symbols have a far greater disruptive effect than symbols not similarly *577 prohibited. Moreover, under Tinker, individualized analysis of each student's clothing every day, see Plaintiffs-Appellants Br. at 16 and Reply Br. at 11, would be unnecessary in a school environment in which school officials reasonably believe that depictions on clothing of an object, such as the Confederate flag, would cause disruptions. See Lowery, 497 F.3d at 591-92 (holding that under the Tinker standard a school does not need to wait until

a disruption has actually occurred before regulating student speech).

D. Plaintiffs-Appellants' Due Process Claim

The district court did not analyze the Due Process claim explicitly but granted summary judgment to the Board on this claim. Plaintiffs-Appellants did not argue due process (substantive or procedural) in their summary judgment motion, mentioned it once (without analysis) in their opening brief for this court, Plaintiffs-Appellants Br. at 14, and devoted two pages to it in their Reply brief, Reply Br. at 10-11 (arguing that the procedural-due-process elements "align themselves with the requirements of Mosley," which conducts an equal-protection analysis). "[A]n issue is deemed forfeited on appeal if it is merely mentioned and not developed." United States v. Clark, 469 F.3d 568, 570 (6th Cir.2006) (citing United States v. Reed, 167 F.3d 984, 993 (6th Cir.1999), cert. denied, 528 U.S. 897, 120 S.Ct. 229, 145 L.Ed.2d 192 (1999)); S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553, 564-65 (6th Cir.2007) (citing Reed, 167 F.3d at 993). Therefore, because Plaintiffs-Appellants failed to develop adequately this issue in their opening brief, we do not consider it.

III. CONCLUSION

Because we conclude that the school reasonably forecast that images of the Confederate flag would substantially and materially disrupt the school environment, we AFFIRM the grant of summary

judgment to the Board with respect to Plaintiffs-Appellants' First Amendment claim. Furthermore, because we conclude that the dress code's ban on racially divisive symbols, as enforced against the Confederate flag, is narrowly tailored to a substantial government interest, we AFFIRM the grant of summary judgment to the Board with respect to Plaintiffs-Appellants' Equal Protection claim. Lastly, Plaintiffs-Appellants have forfeited their Due Process claim, and we AFFIRM the grant of summary judgment with respect to this claim.

C.A.6 (Tenn.),2008.
Barr v. Lafon
538 F.3d 554, 236 Ed. Law Rep. 41

END OF DOCUMENT

Part B
District Court Order Granting Defendants' Motion for Summary Judgment, May 31, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

No. 3:06-CV-75 (VARLAN/SHIRLEY)

JUDGMENT ON DECISION BY THE COURT

This civil action came before the Court, Honorable Thomas A. Varlan, United States District Judge, presiding. The issues having been heard and for the reasons set forth by the Court at

the hearing of this matter on Thursday, May 24, 2007, the Defendants' Motion for Summary Judgment [Doc. 69] is **GRANTED** and plaintiffs' Motion for Summary Judgment [Doc. 56] is **DENIED**.

It is therefore **ORDERED** and **ADJUDGED** that plaintiff shall take nothing, that the action be **DISMISSED WITH PREJUDICE** on the merits, and that defendant shall recover from plaintiff its costs of action.

Dated this 31st day of May, 2007.
/s/ Patricia L. McNutt
CLERK OF COURT

Part C
Transcript of District Court's Ruling from May 24, 2007 Hearing

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE, TENNESSEE

Sharon Brogdon, et al.,
Plaintiffs,

vs.

Steve LaFon, et al.,
Defendants.

Case No. 3:06-cv-75
Motions Hearing

Transcript of proceedings before the Honorable Thomas A. Varlan,
U. S. District Judge, on May 24th, 2007.
Appearances:
On behalf of the Plaintiffs:
Van R. Irion, Esq. Kirk D. Lyons, Esq.
Knoxville, Tennessee Black Mountain, North Carolina
On behalf of the Defendants:
LaJuana G. Atkins, Esq. Gary M. Prince, Esq.
Robert N. Goddard, Esq. Knoxville, Tennessee
Norman H. Newton, Jr., Esq.

Maryville, Tennessee
Court Reporter:
Donnetta Kocuba, RMR
800 Market Street, Suite 132
Knoxville, Tennessee 37902
(865) 524-4590

I N D E X

Oral Argument on Motions:
By Mr. Irion - Pages 4, 27, 51, 79
By Mr. Lyons - Page 14
By Ms. Atkins - Page 16
By Mr. Prince - Pages 27, 69
By Mr. Goddard - Pages 36, 65, 87
Recesses: Page 69, 89
Court's Ruling on Motions: Page 89

Partial Transcript beginning on Page 89:
THE COURT: All right. Thank you, everyone, for your patience and cooperation as the Court took some additional time to review this matter. The Court certainly appreciates the arguments made by counsel today, as well as those presented in the briefs.

As we noted, we are before the Court on three pending motions for summary judgment, three potentially dispositive motions; Plaintiffs' motion for summary judgment, Defendants' collective motion for summary judgment, as well as Defendant Lafon's individual motion for summary judgment.

As we somewhat briefly discussed before the last break, in light of the impending or upcoming nonjury trial before this court, as well as upcoming deadlines associated with that trial, the Court has endeavored to reach a decision today as to these pending motions.

Just to briefly review the facts underlying this case and the arguments made by the parties in their respective motions for summary judgment, Plaintiffs, three students at William Blount High School in Blount County, Tennessee– excuse me just a moment– brought suit alleging that Defendants, the Blount County School Board and Blount County school officials, are violating Plaintiffs' First and Fourteenth Amendment rights by prohibiting them from wearing clothing depicting the Confederate battle flag.

The Blount County Board of Education has adopted a dress code policy which prohibits, under Section 4(f), "clothing which exhibits written, pictorial or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcoholic beverages, racial/ethnic slurs or gang affiliations."

In their motion for summary judgment and supporting brief and in their argument here today, Plaintiffs allege that the Blount County Board of Education's ban on depictions of the Confederate flag

which stems out of a facially neutral ban on all racially divisive symbols, is unconstitutional on three grounds. First, Plaintiffs contend that the ban is not based upon any disruption to the educational process at William Blount High School or possibility thereof, but instead was adopted solely to avoid offending students and parents who find the Confederate flag offensive and is therefore unconstitutional.

Second, Plaintiffs argue that the ban is impermissibly categorical in nature and that Defendant should be required to engage in an individualized analysis of each occasion where a student displays a Confederate flag in order to determine whether that display will cause disruption.

Third, Plaintiffs argue that the ban is impermissibly viewpoint-specific because Defendants prohibit displays of the Confederate flag while allowing displays of other symbols and flags, including specifically, the American flag.

In their motion for summary judgment and supporting brief, Defendants argue that the ban on racially divisive symbols is constitutional for two reasons. First, Defendants state that the ban is justified because it was adopted as a result of past incidents of racially motivated violence, tension and disruption at William Blount High School.

Specifically, Defendants submit that due to racial hostility within William Blount High School it was determined that wearing clothing depicting racially

divisive symbols, including the Confederate flag, would be a violation of the Blount County dress code policy as such clothing would be disruptive to the educational process. Second, Defendants state that no proof has been presented that the ban at issue herein is enforced in a viewpoint-specific manner.

Now, turning to the cross-motions for summary judgment, the Court construes the evidence presented in each motion for summary judgment in the light most favorable to the nonmovant to determine whether there are any genuine issues of dispute of material fact.

First, and as a threshold consideration, as to Plaintiffs' argument or contention that Defendants' motion for summary judgment is only partial, the Court notes that many of Defendants' briefs argue that the ban in question is not enforced in a viewpoint- specific manner, thereby effectively addressing Plaintiffs' Fourteenth Amendment arguments.

Second, the Court notes that the law applicable to this dispute is clear. When the Sixth Circuit affirmed this court's denial of Plaintiffs' first motion for a preliminary injunction, the Sixth Circuit explicitly applied the standard previously articulated by that court in its Castorina and West decisions.

That standard is essentially as follows: School officials may ban what would otherwise be protected speech where it can be shown that the conduct in question, here displays of racially divisive symbols,

including the Confederate flag, would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and when that ban is enforced without viewpoint-specific discrimination.

In confirming this standard, the Sixth Circuit, citing to the West decision, emphasized that, quote, even assuming that no student's wearing of the Confederate flag had caused a disruptive incident in the past, close quote, it is reasonable and permissible to conclude that displays of the Confederate flag would lead to unrest in the future.

Plaintiffs, however, suggest to this court or suggest that the Court ignore or apply in different fashion the standard articulated by the Sixth Circuit in this case on the grounds that this standard is, quote, erroneous, close quote.

Instead, Plaintiffs advocate for the application of a standard relying upon the Supreme Court's decision in Mosley that would require individualized analysis of every display of the Confederate flag to determine the likelihood of disruption resulting from such a display.

However, such is not the law of this circuit in circumstances like those presented by this case, and, therefore, the Court will not apply this suggested approach in this instance. In fact, in argument, Plaintiffs' counsel acknowledges the lack of or failure of other courts to apply such a standard to cases such as this, yet urges this court to, nonetheless, apply

such a standard which the Court will decline to do in light of the clear Sixth Circuit precedent.

Against this legal background and in analyzing the pending cross-motions for summary judgment, the Court is also mindful of the competing viewpoints of wearing the Confederate flag as expressed by the Sixth Circuit in its earlier decision in this case.

On the one hand, in citing the Castorina decision, the 2001 decision of the Sixth Circuit, in its earlier order in this case, the Sixth Circuit notes that the wearing of clothing depicting the Confederate flag is an expression of pride in one's southern heritage constituting speech governed by the First Amendment.

At the same time, also citing its earlier Castorina decision, the Sixth Circuit stated as follows: "Indeed this circuit has also implicitly acknowledged that the Confederate flag qualifies as a controversial, racial and political symbol."

The Sixth Circuit opinion also cites the cases from other federal appellate circuits, specifically, the Eleventh and Fifth Circuits, which explicitly comment upon the Confederate flag's inherent racial divisiveness.

After careful and thorough review of the numerous briefs filed by the parties, the Court finds that the material facts in this case do not appear to be in dispute. Indeed, today Plaintiffs' counsel urges the existence of undisputed material facts to justify

Plaintiffs' motion for summary judgment. And Defendants' counsel today states her agreement that the facts are undisputed such that the Court can grant summary judgment.

Further, looking to the documents in this case, Plaintiff, in its summary judgment motion, at Document 56, states– Plaintiffs, in their summary judgment motion, at Document 56, state as follows: there are "no genuine issues of material fact regarding the critical points raised by Plaintiffs' complaint." Similarly, Defendants, in their summary judgment motion, at Document 69, state that there are "no material facts in dispute."

In the record before the Court, which includes but is not limited to affidavits and reports from the Blount County Sheriff's Department, records and reports from William Blount High School, the affidavits of various Blount County school officials, as well as the testimony of the Plaintiff students themselves, there are in the record before the Court multiple incidents of racially motivated tension, violence and disruption that Defendants state led to the adoption of the ban at issue in this case.

Specifically, these incidents include multiple fights between Caucasian students and African-American students throughout the 2004-2005 school year, an altercation between a Caucasian student and an African-American student on or about February 22, 2005, that resulted in the filing of a racial harassment complaint; racially charged graffiti found throughout the school threatening violence to

African-American students and otherwise using inappropriately vulgar and racially charged words and phrases, all of which has been filed with the Court as photographs taken either by school officials or perhaps more accurately by Blount County sheriff's deputies, all of which is before the Court as part of the record in this case; an incident involving a Caucasian student of the high school who was ultimately arrested and charged after admitting that he and his friends were going to bring a gun to school to kill all African-American students; and a lockdown at the school on April 7, 2005, that resulted from threats made against African-American students.

Plaintiffs today and in their briefs contest the admissibility of certain of these facts presented by Defendants, arguing that some or many of these facts are not supported by admissible evidence. Specifically, while Plaintiffs concede the racially charged underpinning of the graffiti found throughout the school, Plaintiffs argue that other of the incidents of racial unrest and violence cited by Defendants are inadmissible on the basis of lack of personal knowledge, on hearsay grounds, or because certain of these incidents were not tied to a display of the Confederate flag.

Aside from– apart from the statement that the facts presented by Defendants are not admissible and that Plaintiffs' contention here today that non-hearsay does not prove anything, Plaintiffs have presented no real legal or factual proof to sustain those contentions.

Briefly, the Court notes that certain types of hearsay statements are, in fact, admissible under the Federal Rules of Evidence and non-hearsay statements are just that, non-hearsay. The Court further notes that in the record before the Court many of the declarants do, in fact, testify as to occurrences and incidents of which they have personal knowledge as that term would be defined and understood pursuant to the Federal Rules of Evidence.

Therefore, the Court rejects the argument that the facts submitted by Defendants are evidentarily insufficient to support Defendants' motion for summary judgment. The Court also rejects Plaintiffs' contention that evidence submitted by Defendants of certain incidents of racial disruption should be disregarded because those incidents had nothing to do with any display of the Confederate flag.

As the Sixth Circuit noted in its opinion affirming this court's denial of Plaintiffs' motion for a preliminary injunction, "Even without evidence that Confederate flag displays have been the direct cause of past disruptions, school officials reasonably could surmise that such displays posed a substantial risk of provoking problems in the incendiary atmosphere then existing" at William Blount High School.

Accordingly, the Court finds that Defendants are not precluded from offering into evidence in support of their motion for summary judgment incidents of racial unrest, violence and tension not directly linked to displays of the Confederate flag.

Furthermore, aside from the contention that Defendants chose to ban the Confederate flag not in response to these various incidents of racial hostility, but, instead, "because it is offensive to certain students and their parents," Plaintiffs have presented no evidence or presented no evidence contrary to that presented by Defendants showing that the documented incidents of racially motivated violence, tension and disruption at William Blount High School were not, in fact, the motivating factors for the Defendants' adoption of the ban on racially motivated symbols.

Stated another way, Plaintiffs have not sufficiently, for purposes of consideration on the motions before the Court, rebutted these facts presented as undisputed by Defendants.

Lastly, there is no proof before the Court that Defendants enforce the ban on racially divisive symbols in a viewpoint-specific manner. Aside from arguing that the display of the American flag throughout William Blount High School somehow makes the ban viewpoint-specific and that it results in "the Defendants asserting their own viewpoint while denying the Plaintiffs the right to use an identical means of expression to assert a differing viewpoint," Plaintiffs have presented no evidence or fact indicating that this is the case.

As Defendants point out, what was actually banned pursuant to the Blount County School Board's facially neutral dress code policy, was racially divisive symbols, not flags.

Thus, it is incongruous for Plaintiffs to contend that the display of the American flag is evidence of a viewpoint-specific ban as to the wearing of the Confederate flag when the latter has been banned by school officials as disruptive to the educational process.

As to this issue, the Court again cannot ignore the Sixth Circuit's earlier decision in this case that other– in which it noted that other federal appellate courts have explicitly found the Confederate flag to be inherently racially divisive and that the Sixth Circuit has itself "implicitly acknowledged that the Confederate flag qualified as a 'controversial, racial and political system.'"

Here the Court notes that it is similarly not persuaded by Plaintiffs' argument that Defendant Hord's personal statements about the Confederate flag speak to either the constitutionality of the adoption of the ban in question or the manner in which it is enforced.

The Court is unwilling to determine for purposes of these summary judgment proceedings that answers to hypothetical questions posed to Superintendent Hord are material to determining the constitutionality of the ban at issue.

The Court also notes the evidence presented by Defendants of Plaintiffs' awareness of the reasons behind the adoption of the ban at issue and their awareness of the nondiscriminatory manner in which

it is enforced. This includes, but is not limited to, the Plaintiffs' awareness that the ban in question applies not only to the Confederate flag but to any other racially divisive symbol and that the same penalties were in place and applicable for the wearing of clothing depicting other racially divisive symbols as are in place for displays of the Confederate flag.

While Plaintiffs point to the fact that the Confederate flag was singled out at the announcement of the enaction of Blount County's ban on all racially divisive symbols, this alone does not preclude the consideration of entry of summary judgment for Defendants.

As the Sixth Circuit noted in its opinion in this case, in its earlier opinion in this case in reviewing the Court's denial of Plaintiffs' motion for preliminary injunction, this fact makes it a "closer call" as to whether Defendants' ban is viewpoint-specific, but without more the Court finds does not prove that the ban was, in fact, viewpoint-specific, particularly in light of the undisputed and additional testimony from Defendants that they intended to ban all racially divisive symbols and not just the Confederate flag.

As such, the record is ample that past documented incidents of racial unrest, violence and disruption at William Blount High School gave Blount County school officials sufficient and substantial reason to believe that displays of racially divisive symbols, including the Confederate flag, would cause disruption to and interference with the rights of

students at the school and the maintaining of discipline therein, thereby justifying their adoption of a ban on all racially divisive symbols.

Similarly, based upon the undisputed material facts before the Court, Defendants' ban on racially divisive symbols is not in this case imposed in a viewpoint-specific manner. Thus, with the applicable law and undisputed facts as they are, and considering those facts in the light most favorable to the respective non-moving parties, as the Court is required by law to do, the Court finds the Defendants are entitled to judgment as a matter of law.

Accordingly, Plaintiffs' motion for summary judgment is denied and Defendants' motion for summary judgment is granted and judgment will be entered in favor of the Defendants. All other pending motions are denied as moot. A written order of judgment so specifying this decision will follow.

That concludes the Court's consideration for purposes of today's hearing and, again, I appreciate counsel's cooperation, their argument and their patience throughout the afternoon. With that having been said, we will stand adjourned for the day. Thank you all.

(Hearing concluded at 5:14 p.m.)

CERTIFICATION

I certify that the foregoing is an accurate transcript of the record of proceedings in the titled matter.

s/Donnetta Kocuba 7/20/07

Donnetta Kocuba, RPR-RMR Date

Official Court Reporter

U.S. District Court

Knoxville, Tennessee

Part D

Sixth Circuit Opinion Denying Appellants' Petition for En Banc Rehearing Regarding Grant of Defendants' Motion for Summary Judgment, Including Chief Judge Boggs' Dissent, June 27, 2008

553 F.3d 463

United States Court of Appeals,

Sixth Circuit.

Derek BARR; Roger Craig White and Chris White, by and through their parent and guardian Roger White, Plaintiffs-Appellants,

v.

Steve Lafon, in his individual and official capacity as Principal of William Blount High School; Alvin Hord, in his official capacity as Director of Schools; and the Blount County School Board, Defendants-Appellees.

No. 07-5743.

Jan. 23, 2009.

Van R. Irion, Attorney, Law Offices of Van R. Irion, Knoxville, TN, for Plaintiffs-Appellants.

Lajuana G. Atkins, Crawford, Crawford & Newton, Robert N. Goddard, Goddard & Gamble, Norman H. Newton, Jr., Maryville, TN, Gary M. Prince, O'Neil, Parker & Williamson, for Defendants-Appellees.

**464* Before MOORE and CLAY, Circuit Judges; and SCHWARZER, District Judge.[FN*]

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

BOGGS, Chief Judge, dissenting from the denial of rehearing en banc.

Prior to 1969, the ability of public school administrators to enforce their views of reasonable decorum with respect to political symbols was relatively uncontested. In that year, however, the Supreme Court's decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) established that students did

---

FN* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S.Ct. 733. In the case of a student wearing a black armband, apparently as an antiwar protest, the court held that such a display of ideas (however open to interpretation) was constitutionally protected, so long as disruption of school activities could not reasonably be forecast. Absent evidence that certain expression "would substantially interfere with the work of the school or impinge upon the rights of other students," school authorities cannot prohibit it. *Id.* at 509, 89 S.Ct. 733.

While this new policy certainly had costs and benefits, and purported to apply evenhandedly to all symbols and ideas, it carried within itself the seeds of two possible difficulties. The first was whether schools and courts would export their degree of approbation of symbols into the degree to which they could "reasonably forecast" disruption. The second was the extent to which the policy would sanction a "heckler's veto," in the sense that it appeared to make no distinction as to whether the forecast disruption was by supporters or opponents of the symbols. Thus, in the *Tinker* case, the pacific response by any pro-war militants (even though, perhaps, angered by the symbol in the face of the recent deaths in combat of local military personnel) upheld Ms. Tinker's rights, while it was unclear whether an aggressive response by pacifists to military paraphernalia would justify the suppression of such items.

These seeds have come to some fruition in a number of recent cases such as *Harper v. Poway*

Unified Sch. Dist., 445 F.3d 1166 (9th Cir.2006), *cert. granted and vacated as moot*, 549 U.S. 1262, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007) and *Guiles v. Marineau*, 461 F.3d 320 (2d Cir.2006), *cert. denied*, --- U.S. ----, 127 S.Ct. 3054, 168 L.Ed.2d 757 (2007).

Our case arises in a somewhat novel posture. In most cases under *Tinker*, court opinions have focused on what appeared to be an agreed-upon set of facts. In our case, however, the key issue is the extent to which disputes over facts are being treated by conventional summary ***465** judgment standards. In my view, as set forth below, were this an employment discrimination case or a tort dispute, let alone a case with the solicitude for careful examination of disputes of fact normally accorded First Amendment cases, this case would have gone to trial. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (on appeal, a reviewing court must undertake a "fresh examination of crucial facts ... so as to assure ourselves that [the lower court's] judgment does not constitute a forbidden intrusion on the field of free expression"). The key issue is whether the school administrators, in the circumstances of this case, reasonably forecast disruption based on permitting students to display symbols associated with the Confederate States of America.

Instead, in my view, of looking at the facts in the light most favorable to the students, and drawing all reasonable inferences in favor of the students, the court rather uncritically accepts the school administrators' point of view. I will outline a number

of ways in which a reasonable jury could find, under that standard, that the administrators' explanation was not based on a reasonable forecast of disruption, rather than, for example, a desire to avoid political and public controversy-a reason not sanctioned by *Tinker*.

1. The precipitating incident for the policy was a tussle between two students, one black and one white, which led to a parental complaint and an investigation by the Department of Education Office of Civil Rights. The tussle had nothing to do with any symbolism, and the investigation found that the school had not discriminated by punishing the black student as the instigator and not the white student, who was found not to have responded.

Nonetheless, public controversy was aroused.

2. Depositions by the administrators indicated their belief that the mere offensiveness of the Confederate flag to some students provided a sufficient basis for concluding it was disruptive and could be suppressed, or to use the words of one school representative, something that is offensive "will sooner or later" result in a disturbance. JA 115, 122-23. At times, these administrators went still further, suggesting any historic basis for being offended could justify the censorship of expression in general and the Confederate flag in particular. The Blount County Director of Schools, Alvin Lee Hord, answered in the affirmative when asked whether he would continue to support enforcement of the ban even if he became aware "the Confederate flag was

no longer causing disruption." JA 123. And the Principal of William Blount High School admitted history alone might indicate that certain speech was disruptive despite evidence the particular expression would no longer cause a disruption. JA 98.

3. The very thoroughgoingness of the speech suppression, it could be inferred, meant that the policy was based on offense at the symbols themselves, rather than actual fear of disruption. Thus, the record is clear that administrators suppressed not only what might be considered "in your face" tee shirts, but also armbands (the very basis of *Tinker*), belt buckles, automobile decals, and even a distribution of a local newspaper when it contained a symbol. In addition, administrators suppressed a tee shirt with no symbolism at all, but only a legend tweaking the policy itself: "You Can Make Me Change My Shirt, but You'll Never Change My Mind." JA 76.

4. With the above background, the more serious incidents relied on by the ***466** school, which could certainly justify a reasonable jury in concluding that disruption could reasonably be forecast, must be weighed to see whether a reasonable jury might also take the opposite point of view.

It should be emphasized that no disruption of any sort was directly associated with the display of symbols, in that the persons displaying the symbols are not alleged to have been involved in any physical incidents, nor to have instigated even any verbal ones. *Castorina ex rel. Rewt v. Madison County Sch.*

Bd., 246 F.3d 536, 544 (6th Cir.2001) ("If the students' claims ... that there were no prior disruptive altercations *as a result* of Confederate flags are found credible, the court below would be required to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker* ") (emphasis added). The court says that evidence of disruption is "uncontested," but the record suggests otherwise. *Barr v. Lafon*, 538 F.3d 554, 566 (6th Cir.2008). I note that some of the "disruption" was based on administrative time responding to parental complaints. Consider also that one of the plaintiffs to this case, who was involved in a verbal confrontation with another student, testified that after he was called a "dumb redneck," he did not respond because "it's not worth my time beating somebody's butt because they're just acting stupid." JA 82. Though a confrontation short of a violent altercation could amount to a disruption within the meaning of *Tinker*, not every disagreement or incident of name-calling will support the suppression of speech. And it should be left to a jury to determine whether this disagreement both constitutes a disruption and was sufficiently related to the Confederate flag to justify a ban.

The more serious incidents referred to include bathroom graffiti of a graphic and obscene sort, the circulation of two supposed hit-lists, vague rumors that students were bringing guns to school, and the arrest of one student who allegedly told police he planned to pull the fire alarm and shoot people in the ensuing commotion. Although these events are all no doubt frightening, their relationship to the prohibited speech is subject to question. School

officials could not identify students responsible for the vandalism with anyone on either side of the dispute; they could not say the so-called hit-lists targeted members of racial minority groups or students of any particular race; and they did not testify that the student in custody threatened any particular ethnic group as opposed to an act of random violence. Indeed, Director Hord stopped short of saying in his deposition the Confederate flag would "substantially interfere" with the work of the school. Rather, he said the flag was "hurtful to some people" and that he personally thought it was disruptive. JA 115. Even the testimony of school authorities does not paint the picture of a robust threat to the educational mission that would justify (on summary judgment) a ban on political expression. And whatever the record shows about racial animus in Blount County, it does not contain any evidence that even purports to demonstrate that t-shirts merely opposing the school's policy, that do not depict the Confederate flag or any other racially divisive symbols, would substantially interfere with the school's educational mission.

On these facts, in my view, a reasonable jury could draw one of two conclusions. It could conclude, as our court apparently did and the administrators alleged that they did, that any display of Confederate symbolism or of opposition to the school policy could lead to disruption (though it is unclear the extent to which this "disruption" included the disruption for the administrators caused by having to respond to public ***467** outrage at the display, which certainly occurred in *Tinker* as well).

On the other hand, a reasonable jury could conclude that the incidents relied on were not sufficiently serious, or not sufficiently tied to any student speech, that disruption *from display of the symbols* could reasonably be forecast. The jury could conclude instead that the administration, as school administrators sometimes do, was simply trying to prevent public outrage, and that it was easier (or perhaps more in line with their own political views) to suppress the students rather than to uphold the constitutional promise of *Tinker*.

Under these circumstances, I believe that significant First Amendment principles (as established in *Tinker*) are at stake and that rehearing en banc is warranted. If *Tinker* is to remain the law, it should not be used as a sword for some expression but as a shield for those who would suppress some unpopular opinions. I therefore respectfully dissent from the denial of rehearing en banc.

END OF DOCUMENT

Part E
Constitutional Provisions Involved– First Amendment & Fourteenth Amendment

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Part F

Statutory Provisions Involved – 48 U.S.C. § 1983

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Part G
Sixth Circuit Opinion Affirming District Court's Denial of Plaintiffs' Motion for Preliminary Injunction, August 20, 2008

217 Fed.Appx. 518, 2007 WL 541594 (C.A.6 (Tenn.)),
219 Ed. Law Rep. 484, 2007 Fed.App. 0145N

United States Court of Appeals,
Sixth Circuit.

D.B., a Minor, by and through his Parent and Guardian, Sharon BROGDON; R.W. and C.W., both Minors, by and through their Parent and Guardian, Roger White, Plaintiffs-Appellants,

v.

Steve LAFON, in His Individual and Official Capacity as Principal of William Blount High School; Alvin Hord, in His Official Capacity as Director of Schools; Blount County School Board, Defendants-Appellees.

No. 06-5982.
Feb. 21, 2007.

Background: Minor students, through their parents and guardians, filed motion for preliminary injunction, in connection with their action under § 1983 alleging First and Fourteenth Amendment violations in connection with school board policy prohibiting wearing of clothing depicting Confederate battle flag. The United States District Court for the Eastern District of Tennessee denied motion, and students appealed.

Holdings: The Court of Appeals held that:

(1) district court did not clearly err in finding that students' display of Confederate flag had potential to be disruptive;

(2) students' affidavits did not compel conclusion that school board enforced policy at issue in manner amounting to viewpoint discrimination;

(3) fact that Confederate battle flag was only symbol specifically mentioned in announcing challenged policy did not render clearly erroneous district court's conclusion that students failed to produce sufficient evidence of viewpoint-specific ban; and

(4) students failed to sustain their burden of showing that they were likely to succeed on merits of their action.

Affirmed.

*520 On Appeal from the United States District Court for the Eastern District of Tennessee.

Before: DAUGHTREY and COOK, Circuit Judges; and WEBER, District Judge.FN1

PER CURIAM.

**1 Plaintiffs/Appellants Sharon Brogdon and Roger White bring this appeal on behalf of their respective minor children, identified as "D.B.," "C.W." and

---

FN1. The Honorable Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

"R.W.," from a district court order denying their motion for preliminary injunction. For the reasons stated below, we AFFIRM.

I.

On March 2, 2006, the plaintiffs brought suit under 42 U.S.C. § 1983 against the director and school board of Blount County Schools and the principal of William Blount High School, alleging that the defendants violated the First and Fourteenth Amendment rights of the plaintiffs' minor children by prohibiting students from wearing clothing that depicts the Confederate battle flag. In addition to the complaint's prayer for relief, the plaintiffs filed a separate motion for preliminary injunction and temporary restraining order.

On May 4, 2006, the district court held a hearing on the preliminary injunction motion. The parties presented no witnesses, *521 the plaintiffs instead relying upon affidavits submitted as attachments to their complaint, and the defendants upon affidavits submitted in opposition to the motion. In its subsequent order denying the plaintiffs' motion, the court made findings of fact, set forth as follows in pertinent part:

The Blount County Board of Education has adopted a dress code that applies to all high school students. That dress code prohibits students from wearing certain items, including the following:

f. clothing which exhibits written, pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation ...

The ban at issue in this case was imposed pursuant to the provision prohibiting clothing that "causes disruption to the educational process."

... [P]laintiffs allege that on May 30, 2005, during the 2004-05 school year, they, along with the other students at William Blount High School, were informed that depictions of the confederate battle flag on students' clothing would be considered a violation of the school's dress code, even though such depictions were not previously considered violations. On September 1, 2005, during the 2005-06 school year, despite the prohibition and "to express pride in his southern heritage," plaintiff D.B. wore a shirt depicting the confederate battle flag, two dogs, and the words "Guarding our Southern Heritage." He was allegedly confronted by defendant LaFon [sic], the school's principal, who reminded D.B. about the ban, told him to turn his shirt inside out or take it off, and threatened him with suspension if he refused. A similar incident involving plaintiff C.W. allegedly occurred on January 13, 2006. There is no evidence whether plaintiff R.W. had a similar experience.

**2 Plaintiffs allege that William Blount High School permits other expressions "of political or controversial significance," and [that] there have been no disruptions resulting from the depiction of the confederate battle flag ... Plaintiffs D.B. and C.W. also explain in their [affidavits] that they have seen other students wearing foreign flags, Malcolm X symbols, and political slogans.

Defendants have responded in opposition ... and have included two affidavits. In the first affidavit, defendant LaFon [sic] explains that defendant Hord [the director of Blount County Schools] directed him to apply the dress code without viewpoint discrimination and that during the 2005-06 school year there were "over 452 documented violations of the dress code policy ... 23 of which involved the wearing of the 'Confederate flag' by students." Defendant LaFon [sic] goes on to explain that while "there have been no reported incidents of students wearing clothing emblazoned with Malcolm X words or caricatures[ ] or international flags[,][t]here have been numerous non-documented incidents of violations ... beyond those documented."

In the second affidavit, defendant Hord ... describes racial tensions at William Blount High School. According to the affidavit, on February 22, 2005, there was a "physical altercation between a white student and an African-American student," which resulted in a civil rights complaint against the school system. On April 7, 2005, defendant Hord requested that the school be locked down with the presence of sheriff's deputies *522 "due to threats of violence against African-American students."

For the remainder of the 2004-05 school year, defendant Hord explains that sheriff's deputies remained at the school, and there were "multiple racially motivated threats and physical altercations" that resulted in suspensions and civil rights complaints and a civil lawsuit that alleges the school system is "a racially hostile educational environment." During the 2005-06 school year, two more racial harassment complaints were made to the board of education. Based upon those events, defendant Hord concluded that "the wearing of the 'Confederate flag' by students during school hours has a significant disruptive effect on the proper education environment of the students at the Blount County high school."

(R. 22-24, citations omitted).

Applying the balancing test for injunctive relief set forth in Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 888 (6th Cir.2000), to the facts before it, the district court concluded that the plaintiffs could not demonstrate a substantial likelihood of success on the merits. On June 30, 2006, the court entered an order denying the motion for preliminary injunction. The plaintiffs filed this timely appeal.

II.

A district court's decision to grant or to deny a motion for preliminary injunction is reviewed for abuse of discretion. Jones v. City of Monroe, 341 F.3d 474, 476 (6th Cir.2003). The lower court's

determination will be disturbed only if that court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. City of Paducah, 202 F.3d at 888. Under that standard, the district court's legal conclusions are reviewed de novo and its factual findings for clear error. Taubman v. Webfeats, 319 F.3d 770, 774 (6th Cir.2003). A factual finding is clearly erroneous "when the reviewing court is left with the definite and firm conviction that a mistake has been made." United States v. Smith, 263 F.3d 571, 581 (6th Cir.2001).

**3 In determining the appropriateness of the requested injunctive relief, the district court applied the correct four factor balancing test: 1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; 2) whether there is a threat of irreparable harm to the plaintiff; 3) whether issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting injunctive relief. City of Paducah, 202 F.3d at 888. In the context of First Amendment violations, the "likelihood of success" factor frequently is determinative. Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir.1998), cert. denied, 526 U.S. 1087, 119 S.Ct. 1496, 143 L.Ed.2d 650 (1999).

Under case law applicable to free speech claims, "the loss of First Amendment freedoms, for even minimal periods of time," is presumed to constitute irreparable harm. Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Such protection extends to public school students, who do not "shed

their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Nevertheless, "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir.), cert. denied, 531 U.S. 825, 121 S.Ct. 71, 148 L.Ed.2d 35 (2000). Schools *523 need not tolerate student speech deemed inconsistent with the educational mission even if similar speech would not be subject to censor outside the school setting. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). Still, schools may not punish "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" attributable to such expression, and "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker, 393 U.S. at 508, 89 S.Ct. 733.

The wearing of clothing depicting the Confederate flag as an expression of pride in one's southern heritage constitutes speech governed by the First Amendment. Castorina v. Madison County Sch. Bd., 246 F.3d 536, 540 (6th Cir.2001). Nevertheless, school officials may ban what otherwise would be protected speech where "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'." Tinker, 393 U.S. at 509, 89 S.Ct. 733. On the other hand, even where past

racial incidents justify a ban, schools may not impose "a view-point specific ban on [some] racially divisive symbols and not others." Castorina, 246 F.3d at 544. A school's refusal to bar the wearing of apparel depicting Malcolm X symbols along with clothing depicting the Confederate flag "gives the appearance of a targeted ban." Id. at 541.

III.

**4 The plaintiffs assert that the district court erroneously found that the defendants "had reason to believe that a student's display of the Confederate flag might cause disruption." (R. 31, emphasis in original). Given Blount High School's recent history of racial tensions as recited in the record, however, the court's finding to that effect was not clearly erroneous. Even without evidence that Confederate flag displays had been the direct cause of past disruptions, school officials reasonably could surmise that such displays posed a substantial risk of provoking problems in the incendiary atmosphere then existing. "In this case, the district had a reasonable basis for forecasting disruption from display of such items at school." See Derby Unified Sch. Dist., 206 F.3d at 1366; see also Castorina, 246 F.3d at 542 [suggesting that undisputed evidence of past racially-motivated violence or threats in a particular school district could justify a conclusion that "display of the Confederate flag" in such schools might have a "significant disruptive effect"], 543-44["a school board may ban racially divisive symbols when there has been actual racially motivated violence and when the policy is enforced without viewpoint discrimination"].

The plaintiffs' assertion that the district court's ruling "requires a presumption that the Confederate flag is per se 'racially divisive' " and in essence rises "to the level of judicially noticed fact" does not alter this result. While the district court here did not comment explicitly on the Confederate flag's inherent racial divisiveness, other federal appellate courts have. According to the Eleventh Circuit, for example, "[i]t is ... clear that the primary effect of the [Confederate] flag ... is to remind citizens, albeit offensively to some, of a controversial era in American history." NAACP v. Hunt, 891 F.2d 1555, 1564 (11th Cir.1990). Another circuit court has observed that "[i]t is common knowledge that public reaction to and the debate over ... the Confederate [b]attle flag ... has been virtually exclusively in relation to ... whether or to what extent this symbolism extols or excuses slavery, racial oppression or resistance to racial equality." Briggs v. State of Mississippi, 331 F.3d 499, 506 (5th Cir.2003), cert. denied, *524 540 U.S. 1108, 124 S.Ct. 1070, 157 L.Ed.2d 894 (2004). Indeed, this Circuit also has implicitly acknowledged that the Confederate flag qualifies as a "controversial racial and political symbol[ ]." Castorina, 246 F.3d at 542. Accordingly, even if some recognition of the flag's racially divisive nature is implicit in the district court's finding, that finding is not rendered clearly erroneous thereby.

The plaintiffs' assertion that they proved an "[a]bsence of [d]isorder [a]ssociated with the Confederate [f]lag" is not dispositive of that factual issue. Even assuming that no students' wearing of

that symbol had caused a disruptive incident in the past, the district court nonetheless reasonably could conclude that displays of the Confederate flag would be likely to lead to unrest in the future. Such a determination is not erroneous as either a factual finding or a legal conclusion.

**5 The plaintiffs also argue that the district court erroneously failed to find that the defendants enforced the dress code in a viewpoint-specific manner. Plaintiffs cite three examples said to impel this conclusion. First, relying on their affidavits as establishing that the school district regularly failed to discipline students wearing Malcolm X symbols or other national flags, the plaintiffs urge that the evidence compels a factual conclusion that the Confederate battle flag was the only political symbol targeted by the defendants for dress code enforcement. The district court's finding that this evidence did not prove viewpoint discrimination, however, was not clearly erroneous. The evidence indicates that wearing of the Confederate flag accounted for only 23 of 452 instances of dress code violations documented since August of 2005. The plaintiffs presented no evidence showing how frequently or conspicuously other political symbols were worn by students, or even that school officials were aware of the presence of clothing depicting those other political symbols. Evidence presented by the defendants tends to suggest that they were not. In light of evidence of numerous other dress code violations that had not been documented, the district court's speculation that "other instances of dress code violations ... involv[ing] a variety of symbols [ ]" may

have been "resolved informally" also does not constitute clear error.

The plaintiffs also contend that the district court's analysis is internally inconsistent and therefore clearly erroneous. Specifically, the plaintiffs argue that the district court cannot logically conclude that school officials detected and eliminated visible depictions of Confederate flags so quickly as to avert any possible disruptions caused thereby, yet failed to notice clothing depicting Malcolm X symbols and international flags. Because no such inconsistency seems inherent, however-both absent proof of how frequently and conspicuously such other symbols appeared relative to the frequency and conspicuousness of depictions of the Confederate battle flag, and in light of possible justification for differentiating among certain symbols-no clear error finding is warranted on that basis.

Finally, the plaintiffs point to uncontroverted evidence that the Confederate flag was the only symbol specifically mentioned by the defendants when announcing the ban. This presents a closer call, as the fact that the Confederate flag apparently was singled out in this way does bolster the plaintiffs' position. Given the clear error standard of review, however, the appellate court has no basis for disrupting the district court's conclusion that, without more, school officials' citing of that sole example does not prove they intended to ban only the Confederate battle flag, and not other symbols. The district court's conclusion that the plaintiffs *525 "have not produced sufficient evidence to show that the school's policy probably imposes 'a viewpoint-

specific ban on [some] racially divisive symbols but not others' " thus is not clearly erroneous.

**6 The plaintiffs also contend that the district court erred in analyzing their motion under the premise that "[s]chool officials may ban racially divisive symbols when there has been actual racially motivated violence and when the policy is enforced without viewpoint discrimination." (R. 25). They urge that such standard is inconsistent with the one set out in Tinker and utilized by this Court in Castorina. They further argue that as a result of applying an incorrect standard, the district court drew erroneous legal conclusions about the school district's authority to ban the wearing of the Confederate battle flag.

Ironically, the language thus singled out by Plaintiffs appears almost verbatim in Castorina, 246 F.3d at 543-44. Neither is that language inconsistent with Tinker. Under Tinker, "to justify prohibition of a particular expression of opinion," a school district must be able to show only "that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," but rather, "that the school authorities had reason to anticipate that the wearing of [the banned imagery] would substantially interfere with the work of the school or would impinge upon the rights of other students," 393 U.S. at 509, 89 S.Ct. 733, including the right "to be secure and to be let alone." Id. at 508, 89 S.Ct. 733.

Recognizing that the Tinker decision does not require that the banned form of expression itself actually have been the source of past disruptions, subsequent appellate court decisions considering school bans on expression have focused on whether the banned conduct would likely trigger disturbances such as those experienced in the past. See, e.g., Castorina, 246 F.3d at 542; Melton v. Young, 465 F.2d 1332 (6th Cir.1972), cert. denied, 411 U.S. 951, 93 S.Ct. 1926, 36 L.Ed.2d 414 (1973). Although Melton differs in that the record there contained evidence that the Confederate flag in fact had been a factor in past unrest, see 465 F.2d at 1333, 1335, nothing in Melton or Tinker requires evidence of a preexisting incident of the banned symbol evoking disruption. To the contrary, "[t]he fact that a full-fledged brawl ha [s] not yet broken out over the Confederate flag does not mean that [a school] district [i]s required to sit and wait for one." West, 206 F.3d at 1366 (quoting with favor West v. Derby Unified Sch. Dist. No. 260, 23 F.Supp.2d 1223, 1233 (D.Kan.1998)).

Unlike the record in Tinker, the record in this case evidences ample reason for school officials to anticipate disruption resulting from the wearing of the banned symbol. During the prior academic year, Blount High School had been the scene of racial tension, intimidation and violence to such an extent that law enforcement officials were brought in to maintain order, and the school was defending against lawsuits depicting it as a racially hostile educational environment. As discussed above, the district court had a sound factual basis for finding that defendants "had reason to believe that a student's display of the Confederate flag might cause

disruption." Reviewing the district court's analysis de novo, we conclude that neither the legal standard applied nor the legal conclusions drawn were erroneous.

**7 The plaintiffs further argue that the district court erred by assigning them the burden of proof with respect to the four-part balancing test for acquiring preliminary injunctive relief. Although the plaintiffs correctly observe that the defendants would bear the burden at trial of establishing that the Confederate flag ban *526 does not violate the Constitution, it remains the plaintiffs who bear the burden of establishing the need for a preliminary injunction. Connection Distrib., 154 F.3d at 288. The district court appears properly to have required the defendants to show that the ban was justified in light of past racial disturbances at the school, and properly to have found that the defendants sustained that burden. Having failed to respond with evidence sufficient to prove that such ban was enforced in a viewpoint-specific manner, however, the plaintiffs did not sustain their burden of proving that they were likely to succeed on the merits. We therefore AFFIRM the district court's denial of the motion for preliminary injunction.

C.A.6 (Tenn.),2007.
D.B. ex rel. Brogdon v. Lafon
217 Fed.Appx. 518, 2007 WL 541594 (C.A.6 (Tenn.)),
219 Ed. Law Rep. 484, 2007 Fed.App. 0145N

Briefs and Other Related Documents (Back to top)

- 2006 WL 4055735 (Appellate Brief) Brief of the Appellees (Nov. 6, 2006)
- 2006 WL 4055736 (Appellate Brief) Final Reply Brief of the Appellants (Nov. 6, 2006)
- 2006 WL 5002336 (Appellate Brief) Final Brief of the Appellants (Nov. 6, 2006)
- 06-5982 (Docket) (Jul. 28, 2006)

END OF DOCUMENT

Part H
District Court Memorandum Opinion and Order Denying Plaintiffs' Motion for Preliminary Injunction, June 30, 2006

452 F.Supp.2d 813, 214 Ed. Law Rep. 163

United States District Court, E.D. Tennessee.

D.B., a minor, by and through his parent and guardian, Sharon BROGDON, R.W. and C.W., both minors, by and through their parent and guardian Roger White, Plaintiffs,

v.

Steve LAFON, in his individual and official capacity; Alvin Hord, in his official capacity, and Blount County School Board, Defendants.

No. 3:06-CV-75.

June 30, 2006.

Background: Students, through their parents, brought suit against school officials alleging that policy of prohibiting them from wearing clothing depicting Confederate battle flag violated their First Amendment rights. Students moved for preliminary injunction and temporary restraining order.

Holding: The District Court, Varlan, J., held that students failed to show likelihood of success on merits of their claim, as required for preliminary relief.

Motion denied.

*814 Kirk D. Lyons, Southern Legal Resource Center, Inc., Black Mountain, NC, Van Irion, Law Office of Van Irion, Knoxville, TN, for Plaintiffs.

Gary M. Prince, O'Neil, Parker & Williamson, Knoxville, TN, Lajuana G. Atkins, Norman H. Newton, Jr., Crawford, Crawford & Newton, Robert N. Goddard, Goddard & Gamble, Maryville, TN, for Defendants.

MEMORANDUM OPINION

VARLAN, District Judge.

Plaintiffs, three students at William Blount High School in Blount County, Tennessee, allege defendants, Blount County school officials, are violating plaintiffs' First and Fourteenth Amendment rights by prohibiting them from wearing clothing depicting the confederate battle flag.

This civil action is now before the Court for consideration of plaintiffs' motion for preliminary injunction and temporary restraining order [Doc. 3]. Plaintiffs seek an order enjoining defendants "to cease interfering with [p]laintiffs' and other students' constitutionally[-]protected right to express themselves through attire that reflects their political beliefs." Doc. 3 at 4. Plaintiffs argue, inter alia, that a preliminary injunction is appropriate because there is a substantial likelihood that plaintiffs will prevail on the merits. See id. at 8-9. Specifically, plaintiffs argue that the ban is unjustified because defendants have failed to identify any disruption at the high

school caused by depictions of the flag; and even if such disruptions may be shown, defendants are engaging in viewpoint discrimination because they have banned depictions of the confederate battle flag but not certain other political symbols, such as Malcolm X symbols and foreign national flags. See id.

Defendants respond in opposition to the motion by pointing to two facts. First, defendants state that during the 2004-05 school year, William Blount High School experienced a number of racially motivated incidents directed against African-American students, including fighting and threats, that resulted in a school lockdown involving law enforcement, as well as complaints of racial harassment to the board of education and federal officials. See Doc. 7-3. Second, defendants state that there have been 452 dress code violations, 23 of which involved the confederate battle flag, but there have been no reports of violations involving "Malcolm X words ... or international flags." See Doc. 7-2 at 2.

The issues have been briefed thoroughly by both sides, and the Court heard oral argument on May 4, 2006. Thus, the motion now is ripe for disposition. For the reasons discussed herein, the Court will deny plaintiffs' motion for preliminary injunction and temporary restraining order.

*815 I. Relevant FactsFN1

FN1. These facts are drawn from the parties' respective pleadings, briefs, and exhibits. See Docs. 1, 3, 7, 15. Prior to and at the outset of the hearing on the instant motion conducted on May 4, 2006, the Court specifically invited both parties to

The Blount County Board of Education has adopted a dress code that applies to all high school students. See Doc. 7-3 at 5. That dress code prohibits students from wearing certain items, including the following:

f. clothing which exhibits written, pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation

Id. The ban at issue in this case was imposed pursuant to the provision prohibiting clothing that "causes disruption to the educational process." Id. at 3.

This action was initiated by the three plaintiffs with the filing of their complaint on March 2, 2006. See Doc. 1. In the complaint, plaintiffs allege that on May 30, 2005, during the 2004-05 school year, they, along with the other students at William Blount High School, were informed that depictions of the confederate battle flag on students' clothing would be considered a violation of the school's dress code, even

---

present additional evidence if either party thought it was necessary. Both parties, however, declined by indicating that they would rely only on the facts contained in their respective briefs and exhibits.

though such depictions were not previously considered violations. See id. at 3-4. On September 1, 2005, during the 2005-06 school year, despite the prohibition and "to express pride in his southern heritage," plaintiff D.B. wore a shirt depicting the confederate battle flag, two dogs, and the words "Guarding our Southern Heritage." See id. at 4. He was allegedly confronted by defendant LaFon, the school's principal, who reminded D.B. about the ban, told him to turn his shirt inside out or take it off, and threatened him with suspension if he refused. See id. A similar incident involving plaintiff C.W. allegedly occurred on January 13, 2006. See id. There is no evidence whether plaintiff R.W. had a similar experience.

Plaintiffs allege that William Blount High School permits other expressions "of political or controversial significance," and there have been no disruptions resulting from the depiction of the confederate battle flag, but nevertheless defendants implemented the ban. See id. at 4-5. Plaintiffs D.B. and C.W. also explain in their declarations that they have seen other students wearing foreign flags, Malcolm X symbols, and political slogans. Docs. 1-2, 1-3. Consequently, plaintiffs allege violations of free speech, equal protection, and due process, and seek injunctive relief, a declaratory judgment, and damages. See id. at 5-8.

At the same time the complaint was filed, plaintiffs filed the instant motion. See Doc. 3. Defendants have responded in opposition to the motion and have included two affidavits. See Doc. 7. In the first affidavit, defendant LaFon explains that defendant

Hord directed him to apply the dress code without viewpoint discrimination and that during the 2005-06 school year there were "over 452 documented violations of the dress code policy ..., twenty-three (23) of which involved the wearing of the 'Confederate flag' by students." Doc. 7-2 at 2. Defendant LaFon goes on to explain that while "there have been no reported incidents of students *816 wearing clothing emblazoned with Malcolm X words or caricatures[ ] or international flags[,][t]here have been numerous non-documented incidents of violations ... beyond those documented." Id.

In the second affidavit, defendant Hord, the director of Blount County Schools, describes racial tensions at William Blount High School. See Doc. 7-3 at 2-3. According to the affidavit, on February 22, 2005, there was a "physical altercation between a white student and an African-American student," which resulted in a civil rights complaint against the school system. Id. at 2. On April 7, 2005, defendant Hord requested that the school be locked down with the presence of sheriff's deputies "due to threats of violence against African-American students." Id. at 3.

For the remainder of the 2004-05 school year, defendant Hord explains that sheriff's deputies remained at the school, and there were "multiple racially motivated threats and physical altercations" that resulted in suspensions and civil rights complaints and a civil lawsuit that alleges the school system is "a racially hostile educational environment." Id. at 2, 3. During the 2005-06 school year, two more racial harassment complaints were

made to the board of education. Based upon those events, defendant Hord concluded that "the wearing of the 'Confederate flag' by students during school hours has a significant disruptive effect on the proper education environment of the students at the Blount County high school." Id. at 3.

II. Discussion

A. Standard for Relief

A party seeking a temporary restraining or preliminary injunction order bears the burden FN2 of establishing four factors, which the Court must balance: (1) irreparable harm to movant if such an order is not entered; (2) likelihood of harm to others if such an order is entered; (3) movant's substantial likelihood of success on the merits; and (4) the impact on the public interest by entry of such an order. See Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 887 (6th Cir.2000); Connection Distrib. Co.

FN2. Plaintiffs contend that defendants bear the burden of disproving plaintiffs' allegations of a constitutional violation, and defendants' failure to satisfy that burden results in plaintiffs' satisfaction of their burden to show a substantial likelihood of success on the merits. See Doc. 15 at 9 (citing Castorina v. Madison County Sch. Bd., 246 F.3d 536, 543-44 (6th Cir.2001)). Castorina, however, did not so state. Instead, plaintiff bears the burden of establishing the need for a preliminary injunction. See Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir.1998). A plaintiff would satisfy that burden, in part, by showing a substantial likelihood of success on the merits. See id. A plaintiff establishes that he or she has a substantial likelihood of success on the merits by showing that the policy in question is probably unconstitutional. See id. (citing Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460 (6th Cir.1991)).

v. Reno, 154 F.3d 281, 288 (6th Cir.1998) (citing Golden v. Kelsey-Hayes Co., 73 F.3d 648, 653 (6th Cir.1996), cert. denied, 519 U.S. 807, 117 S.Ct. 49, 136 L.Ed.2d 13 (1996)).

When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits factor is often determinative. Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir.1998). With regard to the irreparable harm factor, courts have long recognized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality), quoted in Connection Distrib. Co., 154 F.3d at 288. Therefore, to the extent a *817 plaintiff can establish a substantial likelihood of success on the merits of the First Amendment claim, that plaintiff has also established the possibility of irreparable injury. See Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir.1995), quoted in Connection Distrib. Co., 154 F.3d at 288. The same is true with regard to the public interest factor, because the public interest always lies with protection of a party's constitutional rights. See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir.1994). See also Fisher, 70 F.3d at 1490. Furthermore, an examination of harm to the parties also requires a consideration of the merits, since the harm to a party resulting from imposition (or not) of an injunction is related to whether the conduct subject to the injunction is unconstitutional (or not). See Connection Distrib. Co., 154 F.3d at 288.

In this case, for the reasons just discussed, the likelihood of success on the merits factor is determinative, and consideration of that factor will be the focus of the remainder of this discussion. Accordingly, the crucial inquiry for the Court is whether the policy in question is likely to be found unconstitutional. See Connection Distrib. Co., 154 F.3d at 288 (citing Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460 (6th Cir.1991)).

B. Constitutionality of Confederate Battle Flag Prohibition

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Equally important, however, "the [Supreme] Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Id. at 507, 89 S.Ct. 733. Thus, school officials may not punish "silent, passive expression of opinion, unaccompanied by any disorder or disturbance." Id. at 508.

School officials may ban racially divisive symbols when there has been actual racially motivated violence and when the policy is enforced without viewpoint discrimination. See West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir.2000), discussed in Castorina v. Madison County Sch. Bd., 246 F.3d 536, 543-44 (6th Cir.2001). On the other hand, even if there has been racial violence that justifies a ban on racially divisive symbols, school

officials may not enforce "a viewpoint-specific ban on [some] racially divisive symbols and not others." Castorina v. Madison County Sch. Bd., 246 F.3d 536, 544 (6th Cir.2001).

In light of those principles, a plaintiff would demonstrate a substantial likelihood of success on the merits if he or she can show that the prohibited expression is probably not accompanied "by any disorder or disturbance." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Melton v. Young, 465 F.2d 1332, 1335 (6th Cir.1972). See Connection Distrib. Co., 154 F.3d at 288 (citing Congregation Lubavitch, 923 F.2d at 460). Even if a plaintiff failed to satisfy that burden, however, he or she could also demonstrate a likelihood of success on the merits by showing that the school's policy probably imposes "a viewpoint-specific ban on [some] racially divisive symbols and not others," see Castorina v. Madison County Sch. Bd., 246 F.3d 536, 544 (6th Cir.2001). In this case, plaintiffs argue that they can show both that displays of the confederate battle flag are unaccompanied by any disruption and *818 also that the ban is viewpoint-specific. See Doc. 3. On the other hand, defendants argue that such displays are accompanied by disruption and the ban is not viewpoint-specific. See Doc. 7. Thus, the Court will address both issues.

i. Any Disorder or Disturbance

Turning first to plaintiffs' argument that displaying the confederate battle flag on students' clothing was not accompanied by "any disorder or disturbance," defendants point to racial tensions that resulted in

several disruptions during the school year before the ban was made explicit to the students at a school assembly. See Doc. 7-3. Plaintiffs respond, however, that defendants have failed to "make any connection between the [c]onfederate [battle] flag and any incident of racially motivated violence or threats," because the incidents cited by defendants were not the direct result of displays of the confederate flag. See Doc. 15 at 2. Furthermore, plaintiffs argue that such a connection is only established where a causal relationship between the prohibited expression and the disruption is shown. See Doc. 3 at 7 (arguing "that without a showing of disruption as a result of the students' wearing T-shirts displaying the flag, their suspension must be struck down." (citation omitted) (emphasis added)).

Plaintiffs, however, require too much. In Tinker, the Supreme Court struck down a ban on black armbands because it was based upon nothing more than "undifferentiated fear or apprehension of disturbance," since there had been no disruptions either before or after the students displayed their armbands. Tinker, 393 U.S. at 508, 89 S.Ct. 733. Nowhere does Tinker require a direct causal relationship between the expression and the disruption. Instead, Tinker requires school officials to show that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' " Id. at 509, 89 S.Ct. 733 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir.1966)). More precisely, the Tinker Court was looking for "evidence that the school authorities had reason to anticipate that the wearing of the

armbands would substantially interfere with the work of the school or impinge upon the rights of other students." Id. (emphasis added).

In West v. Derby Unified School District No. 260, a middle school student was suspended after drawing a confederate battle flag in violation of the school's racial harassment policy, which was implemented following "incidents of racial tension." 206 F.2d at 1361. In Melton v. Young, at the beginning of the 1969 academic year, "the student body became racially polarized," which required police involvement, and administrators responded by appointing a committee that specifically concluded that the confederate battle flag caused the disruption, which resulted in a ban. 465 F.2d at 1333.

Applying Tinker, the Tenth Circuit, in West, held, "The evidence in this case, however, reveals that based upon recent past events, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone." West, 206 F.3d at 1366 (citing Tinker, 393 U.S. at 508, 89 S.Ct. 733) (emphasis added).FN3 Likewise, the Sixth Circuit, in Melton, applied Tinker in the same way, although

---

FN3. In Castorina, the Sixth Circuit characterized the decision in West by saying it "merely demonstrates that a school board may ban racially divisive symbols when there has been actual racially motivated violence...." Castorina, 246 F.3d at 543 (emphasis added).

with stronger facts, "finding that *819 the history of racial unrest [in Melton] amounted to a material disruption at the school and that the committee's specific findings showed that there was more than 'an undifferentiated fear or apprehension of disturbance.' " Castorina, 246 F.3d at 544 (quoting Melton, 465 F.2d at 1334-35) (emphasis added).

While the facts of the present case are not as strong as those in Melton-because the Court does not have the specific finding of a committee or the prevalence of confederate battle flags-nor are they as weak as those in Tinker-since the Court does have the history of racial unrest at the school. Instead, the Court is faced with a case somewhat more akin to West, in which there is "actual racially motivated violence" directed at African-American students. Castorina, 246 F.3d at 543 (characterizing the facts in West).

Here, the Court has evidence of a number of racially motivated incidents, including physical altercations between Caucasian and African-American students, racially motivated threats against African-American students, and civil rights complaints, which created a racially tense and charged atmosphere. See Doc. 7-3 at 2-3. At one point, defendant Hord locked down the school and called sheriff's deputies as a result of threats against African-American students. See id. at 3. In that atmosphere, the Court is hard-pressed to conclude that defendants banned displays of the confederate battle flag based on nothing more than "undifferentiated fear or apprehension of disturbance." Tinker, 393 U.S. at 508, 89 S.Ct. 733.

Instead, based on the evidence before the Court at this early stage, it appears more likely that defendants had "reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone." West, 206 F.3d at 1366 (citing Tinker, 393 U.S. at 508, 89 S.Ct. 733) (emphasis added). See also Castorina, 246 F.3d at 543 (characterizing the facts in West). Thus, plaintiffs have failed to demonstrate that the prohibited expression is probably not accompanied "by any disorder or disturbance." Tinker, 393 U.S. at 508, 89 S.Ct. 733; Melton, 465 F.2d at 1335. See Connection Distrib. Co., 154 F.3d at 288 (citing Congregation Lubavitch, 923 F.2d at 460).

ii. Viewpoint-Specific Ban

Turning to the argument that the ban is viewpoint discriminatory, plaintiffs point to defendant LaFon's affidavit reporting 23 disciplinary instances involving confederate battle flag symbols and no reports of disciplinary instances involving symbols of Malcolm X or international flags. See Doc. 7-2 at 2. Plaintiffs contend that those figures demonstrate that the dress code is enforced against the confederate battle flag, but not against other political symbols. See Doc. 15 at 4. Plaintiffs also point to the school assembly when school officials explicitly stated the ban applied to the confederate battle flag, but did not mention other symbols. See id. at 5. Finally, plaintiffs, in their own affidavits, claim that they have seen students wearing Malcolm X symbols, foreign national flags, and political slogans. See Docs. 1-2 at 2; 1-3 at 2.

First, plaintiffs' argument over-emphasizes the significance of the dress code violations reported in the LaFon affidavit. Defendant LaFon stated that there were 452 reported dress code violations, 23 of which involved displays of the confederate battle flag, and that there were no reported dress code violations involving displays of "Malcolm X words or caricatures, or international flags." Doc. 7-2 at 2. Significantly, defendant LaFon went on to state, *820 "There have been numerous non-documented incidents of violations of the dress code beyond those documented." Id. In other words, there may be other instances of dress code violations, which may involve a variety of symbols, that were resolved informally. Nevertheless, plaintiffs assume that defendant LaFon's affidavit establishes that defendants only single out displays of the confederate battle flag for disciplinary action. The Court declines to make that same assumption without more facts.

Second, based upon the present record, the Court cannot attach the significance to the school assembly that plaintiffs suggest in their argument that it establishes viewpoint discrimination. Plaintiffs contend that the assembly demonstrates that school officials were targeting displays of the confederate battle flag, and not other symbols, as violations of the dress code. See Doc. 15 at 4. Their complaint, however, only states that school administrators informed students at that assembly that depictions of confederate battle flags on students' clothing would be prohibited. See Doc. 1 at 3. Based only on this allegation from the complaint, plaintiffs assume school administrators were only banning the confederate battle flag, and not other symbols. But

without more facts, the Court is unable to distinguish between plaintiffs' interpretation and other possible interpretations of school officials' statements at the school assembly.

Third, plaintiffs' claims to have seen other students wearing other political symbols are not sufficient to show a viewpoint discrimination, because such claims do not tell us how those symbols are treated under the dress code. Plaintiffs claim to have seen other students wearing certain symbols; but importantly, they fail to explain whether such displays were sanctioned or even seen by school officials, which would explain whether school officials were targeting some symbols but not others. See Docs. 1-2 at 2; 1-3 at 2. Nevertheless, plaintiffs conclude that, because they saw some students wearing certain symbols, there must be a viewpoint-specific ban. See Doc. 15 at 4. The Court cannot reach a similar conclusion without more than plaintiffs' general claims, because claiming to have seen other students wearing a particular symbol is not the same as demonstrating that school officials "refus[ed] to bar the wearing of this apparel along with the [c]onfederate [battle] flag [,] [which] gives the appearance of a targeted ban, something that the Supreme Court has routinely struck down as a violation of the First Amendment." Castorina, 246 F.3d at 541 (citations omitted).

Overall, while plaintiffs have pointed to some evidence that defendants are enforcing the dress code against displays of the confederate battle flag, they have not produced sufficient evidence to show that the school's policy probably imposes "a viewpoint-

specific ban on [some] racially divisive symbols and not others." See Castorina v. Madison County Sch. Bd., 246 F.3d 536, 544 (6th Cir.2001).

III. Conclusion

In summary, for the reasons discussed herein, plaintiffs have not presented evidence sufficient to establish a substantial likelihood of success on the merits. Accordingly, the motion for a preliminary injunction will be denied.

ORDER ACCORDINGLY.

E.D.Tenn.,2006.
D.B. ex rel. Brogdon v. Lafon
452 F.Supp.2d 813, 214 Ed. Law Rep. 163

• 3:06cv00075 (Docket) (Mar. 2, 2006)
END OF DOCUMENT

Part I
Sixth Circuit Opinion Denying Appellants' Petition for En Banc Rehearing Regarding Denial of Preliminary Injunction, including Chief Judge Boggs' Dissent, June 27, 2008

No. 06-5982

Amended Order

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D.B, A MINOR, BY AND THROUGH HIS PARENT AND GUARDIAN, SHARTON BROGDON; R.W. AND C.W., BOTH MINORS, BY AND THROUGH THEIR PARENT AND GUARDIAN, ROGER WHITE,

Plaintiffs-Appellants,

v.

STEVE LAFON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS PRINCIPAL OF WILLIAM BLOUNT HIGH SCHOOL; ALVIN HORD, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF SCHOOLS; BLOUNT COUNTY SCHOOL BOARD,

Defendants-Appellants.

BEFORE: DAUGHTREY and COOK, Circuit Judges; and WEBER,[30] District Judge

---

[30] Hon. Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

Pending before the panel is appellant's Petition for Rehearing, the Suggestion for Rehearing En Banc having been denied upon a vote of the full court. The Petition having been returned to the panel, we deny the Appellant's Petition for Rehearing.

BOGGS, Chief Judge, dissenting from the denial of rehearing en banc.

The First Amendment tolerates limits on student expression in the public schools that would not be acceptable if applied in the outside world. But it still imposes a heavy burden on the school administrator who would suppress speech: such suppression is justified only if the speech would "materially and substantially interfere with the requirements of appropriate discipline." Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503,509(1969). Relying on an outlying case from the Tenth Circuit, this court has now held that student speech could be suppressed as long as it "might cause disruption." *D.B. v. Lafon*, 217 F.App'x518,525(6th Cir.2007)(emphasis in original)(citing *West v. Derby Unified Sch. Dist. No. 260*,206 F.3d 1358,1366 (10th Cir. 2000)). Because this flimsier requirement conflicts with *Tinker* and undermines the First Amendment, I dissent from our circuit's declining to rehear this case en banc.[31]

---

[31] There is a procedural point that should have obviated the merits ruling that is at issue here. While the en banc petition concerning the district court's denial of a preliminary injunction was pending, the district court rendered final judgment for the defendants in the this case.

This case involves a high school's ban on all clothing depicting the Confederate flag. The Blount County School District announced this policy in May 2005. The plaintiffs, several students who were admonished for wearing such clothing and forced to remove the emblem on pain of punishment, sought a preliminary injunction against the ban's enforcement. Both the district court and this court denied their request.

This court based its belief that depictions of the Confederate flag might cause disruption on the following events:

1. a fight between two students of different races on February 22, 2005;

The defendants themselves advised the court that the case was now moot. Nevertheless, our court has chosen not to declare the case moot and vacate the prior opinion.

I believe that would have been the better course, as it was exactly the course taken by the Supreme court of the United States in the very similar case of Harper v. Poway Unified School District, 127 S. Ct. 1484(2007). There the district court had similarly refused to protect the *Tinker* rights of a student by issuing a preliminary injunction, and the Ninth Circuit had upheld that decision. The Supreme Court noted that "[w]e have previously dismissed interlocutory appeals from the denials of motions for temporary injunctions once final judgment has been entered." *Ibid.* (citing cases). The Court went on to note that "vacatur of the prior judgment is also appropriate to clear the path for future re-litigation of the issues between the parties and to eliminate a judgment, review of which was prevented through happenstance." Ibid. (citations omitted). It then vacated the judgments below and remanded with instructions to dismiss as moot.

This case seems to be on all fours with the Supreme Court's action in Harper (indeed, the merits appeal from the final judgment of the district court in this case was argued on April 22 of this year. See Case No. 07-5743, Barr v. Lafon. Nevertheless, our circuit's opinion on the preliminary injunction remains on the books and thus necessitates a response on the merits.

2. complaints filed with the United States Department of Education Office of Civil Rights, with the Blount County School Board, and in federal court by African-American students and parents, alleging primarily that the school imposed harsher punishments on African-American students than on white students for the same infraction, without any cited reference to Confederate emblem display;

3. police being called to the school by the authorities in April 2005 "due to threats of violence against African-American students" (documents subsequently filed with the district court indicate that this refers to racist graffiti discovered in restrooms, perpetrators not identified); and

4. unspecified "racially motivated threats and physical altercations," leading to disciplinary actions including suspensions against unspecified students.

A comparison of this case to *Tinker* illustrates the damage done by the "might cause disruption" standard. This case would be exactly analogous to *Tinker* if, in *Tinker*, the following events had occurred:

1. Several months before Mary Beth Tinker wore her black armband, two students had a fight. One was from a pro-war family, one from an anti-war family. There was no allegation that the fight had anything to do with the war, or with black armbands.

2. Some pro-war parents had filed complaints with prosecutors and government

agencies, asking that "treasonous activities" at the school be investigated. There was no allegation that Mary Beth Tinker or black armbands were mentioned in the complaints.

3. Graffiti had been found in restrooms with a list of children whose parents were "baby killing soldiers" and deserved to die. There was no indication of the perpetrators and no mention of black armbands.

4. There were unspecified reports of conflict between pro- and anti-war students, with no mention of black armbands.

I cannot conclude that adding these facts would have caused the Supreme Court to allow the suppression of Mary Beth Tinker's speech. None of the hypothetical events involved either Tinker or her symbol. At best, allowing suppression based on such remote and undifferentiated information would raise the specter of a "heckler's veto," permitting students to silence the unwanted speech of their peers by causing a disruption themselves. At worst, it would permit school administrators to censor speech merely because they find its content objectionable, simply by positing a connection between speech and disruption where evidence shows none.

Justice Thomas's concurring opinion in Morse v. Frederick, 127 S. Ct. 2618, 2633-36 (2007)(Thomas, J., concurring), has cogently pointed out a number of problems with the law in Tinker, especially the extent to which it is "malleable." Id. at 2635-36. Nevertheless, Tinker remains the law, and

it compels a robust protection of the free speech rights of the students here.

One of the problematic aspects of Tinker is that, while it is generally taken as a ringing defense of free speech, it lends itself to manipulation by school authorities to permit symbolic displays of which they approve, while suppressing displays of which they disapprove (or are under political pressure to suppress). Unless the doctrine is applied evenhandedly by school districts, and by courts in litigation such as this case, while permitting display of graphics that might certainly be considered offensive by many. See, e.g., Guiles v. Marineau, 461 F.3d 320 (2nd Cir. 2006), a Second Circuit decision upholding the display of graphics depicting the President as a drug-using coward.

The symbol at issue here, the Confederate flag, is fraught with controversy over its meaning and interpretation. Some groups refer to it as "Heritage, not Hate," white others see it as exactly the opposite. Or it may simply connote an appreciation of the music of Hank Williams, Jr. See Castorina v. Madison County School Board, 246 F.3d 536, 538. (2001). But that ambiguity is no different than with many important symbols, not least the display by Ms. Tinker herself. In the context of the Vietnam War in 1967, her black armband could have been taken as meaning anything from a principled objection to all war, to a nuanced geopolitical judgment that the war was not worth fighting, to a moral condemnation of all American military efforts, to an outright desire for the victory of the Viet Cong, to an affirmative approval of the reeducation and

liquidation of those who fought on the side of the United States. The crucial point, however, is that one's interpretation of the symbol cannot be allowed to govern whether or not it can be suppressed, either in Tinker, or in our case.

Tinker is also problematic in that it does place a true "heckler's veto" in the hands of those who create actual disruption. Thus, ironically, apparently under Tinker when militaristic students have sufficient discipline not to fight over peace symbols those symbols may stay; however, if a pro-military display is attacked by pacifists, that display must come down. However ironic that doctrine is, it allows prohibition of speech when "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school..." Tinker, 393 U.S. at 509. As I have outlined above, the record in this case falls far short of the showing that should be necessary to suppress controversial speech. And that is why I dissent from our circuit's refusal to rehear this case en banc.

Tinker still controls the case after the Supreme Court's decision in Morse v. Frederick, 127 S. Ct. 2618 (2007). Although "the mode of analysis set forth in Tinker is not absolute," id. At 2627, a school's burden to produce evidence of disruption is limited only in specific circumstances: when a student's speech advocates illegal drug use, id. At 2622, is "indecent, lewd, and offensive," Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986), or "bear[s] the imprimatur of the school," Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260, 271 (1988). In

his controlling concurrence, Justice Alito, joined by Justice Kennedy, explicitly stated that he "join[ed] the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions" beyond those three. Morse, 127 S. Ct. at 2637 (Alito, J., concurring). Morse "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." Id. at 2636 (Alito, J., concurring).

As long as Tinker is the law, it does not permit suppression of speech on mere supposition that expression, however offensive to some, will in fact cause disruption. The school need not wait for actual disruption, but it must have more than a general belief that school will be nicer without the Confederate emblem. Tinker emphatically rejected the position that only "nice" slogans will be allowed, but not "un-nice" ones. The Ninth Circuit's view to the contrary in Harper v. Poway Unified School District, 445 F.3d 1166 (9th Cir. 2006), was recently vacated by the Supreme Court, see 127 S. Ct. 1484 (2007). I believe that it was error to permit continuing suppression of speech without stronger evidence than was present here, and I therefore respectfully dissent from the denial of rehearing en banc.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

Part J
Affidavit of Steven Lafon, 3/13/06

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

No. 3:06-CV-75 (VARLAN/SHIRLEY)

AFFIDAVIT OF STEVEN LAFON

State of Tennessee
County of Blount

Steven Lafon, being first duly sworn makes oath in due form of law as follows:

1. That I am Steven Lafon, the Principal of William Blount High School, that the information contained in this Affidavit is based upon my own personal knowledge and that I am competent to testify as to these matters.

2. I was a teacher at William Blount High School for a period of seven (7) years prior to becoming Principal in July 2005.

3. Based upon my personal knowledge, the incidents reported in Alvin L. Hord's affidavit are accurate.

4. As Principal, I have been directed by Alvin L. Hord to apply the provisions of the dress code evenly without viewpoint discrimination, and I have done so. Since August 2005 through the present, there have been over 452 documented violations of the dress code policy at William Blount High School, twenty-three (23) of which involved the wearing of the "Confederate flag" by students. In all 452 instances, the dress code was evenly applied without viewpoint discrimination. There have been no reported incidents of students wearing clothing emblazoned with Malcolm X words or caricatures, or international flags. There have been numerous non-documented incidents of violations of the dress code beyond those documented.

5. All students at William Blount High School who have been approached about a violation of the dress code policy have complied with the policy by either covering disruptive symbols, removing the garment or turning the garment inside out, and no student

has been suspended, including the Plaintiffs, for the wearing of racially divisive clothing.

Affiant further saith not.

s/Steve Lafon
Steve Lafon

SWORN TO AND SUBSCRIBED before me this 13th day of March, 2006.

s/Nancy E. Allmon
Notary Public

My commission Expires
10/29/06

Part K
Partial Deposition Transcript of Alvin Hord, January 4, 2007

DEPOSITION OF ALVIN LEE HORD

January 4, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

Civil Action
No. 3:06-CV-75 (VARLAN/SHIRLEY)

You know it has to ----you have to show that you have rental history and that you enforce that policy unilaterally that you don't enforce a policy one way and one way another time with other kinds of articles. If they were offensive things to other groups of people and we chose to enforce only the ban on the Rebel flag, then I think that would cause problems and that I think that would be the thing that the Board would ask us, Mr. Lafon and myself, if we were doing.

Q. Who enforces the ban?

A. The day-to-day Principals and teachers enforce it.

Q. I understand that there are SRO officers?

A. Yes, School Resource Officers are the High School and they are involved in disciplinary matters as they deem necessary or the Principal deems necessary.

Q. Is a disruption required to enforce the ban against a particular student?

A. We have chosen based on our past history to ban it because of disruptions.

Q. But the question is, if a student was to wear a confederate flag shirt to school would a disruption on that day based on that shirt be required in order to enforce the ban against that student?

A. No.

Q. Is a complaint from another person required?

A. No.

Refers to that in that letter where there was some altercations and that ban was continued because of the feeling that it was—that African-American students have when they saw that flag, and she is elaborating on that in that letter.

Q. And do you know if those altercations were caused by the flag?

A. I know the flag was part of it. I don't know whether it specifically caused, the flag caused it.

Mr. Prince: Counselor, do you want to mark that as an exhibit?

Mr. Irion: Do you have extra copies?

Ms. Atkins: No, I don't.

Mr. Goddard: We can make some here.

Ms. Atkins: Yes, I just asked him to look at records to find anything that he had used to make his decision and he had not provided that to us yet. But if we can make a copy here, we would be glad to do it.

By Mr. Irion:

Q. How long do you plan on keeping the ban on the Confederate flag in place?

A. I don't recall plan on lifting it.

Q. Ever?

A. Well you never want to ever say never, but I don't have any immediate plans to say don't ban the flag.

Q. What factors would you consider if you were going to lift it?

A. I would consider an outcome of some legal judge ordering us to. I would think that is about the only one I would consider.

Let me add to that, too. Obviously, I have superiors, if they decide to lift it, I am going to go by their wishes.

Q. I asked you a little while ago if there were any other circumstances, incidents that you would use to justify the ban and we started discussing the letter. Was there anything else?

A. Not that I can think of.

Mr. Irion: Okay. And do you want to take another break so I can review this and review that?

Ms. Atkins: Great.

(Whereupon, a short break was had.)

By Mr. Irion:

Q. I am ready. If everyone else is ready.

Okay. Showing the witness a document that begins Step Team Incident on January 28th, 2005. Let the record reflect that all of Counsel have copies. What is this document?

A. This is, I guess, a timeline of a simulation of the events and I think we did this for one of the suits of things that had happened, January 2005 through the school year and

Specifically still necessary, you wouldn't know?

A. I think the ban is necessary.

Q. But how would you become aware if the ban was no longer necessary?

A. How would I become aware? I think if people that I know that it was offensive to and the African American students came and said, you know, I have been thinking about this Rebel flag deal, I like it, that would change my—I can't think of any—you know, the fact that you had the ban on the flag, and I am probably doing something here that they don't want me to do, but the ban on the flag is going to reduce suspensions maybe, because it reduces the chances of kids having altercations. So you can say then the reduction in the suspensions is a cause to put the Rebel flag back; I don't see it that way. I think because we have banned it there has been fewer incidents of altercations and all of those things. That is my belief. I don't have last year's numbers and the year before last and this year to compare it to, but that is my belief.

Q. So you don't know how many students have been cited for wearing the Confederate flag this year or last year?

A. No. No.

Q. After all of the incidents—back up. The beginning of the 2005-2006 school year when Mr. Lafon started, the fresh start?

A. It would be enforcing a ban on one side and not because of a particular feeling in expressing in a similar kind of thing that was offensive to somebody else.

Q. How would that work with the current ban on the Confederate flag?

A. You would—we will use Mr. Lafon as an example. If he banned and enforced the policy on the Rebel flag and then he allowed other things that were offensive to other students and their parents to be worn.

Q. I'm sorry, could you repeat that?

A. He would enforce the Rebel flag, he wouldn't enforce other things they were offensive.

Q. Other symbols?

A. Anything that proved to be a problem, he would do one without doing the other. He would pick one or choose one, that is my understanding of it. I can't use my viewpoint and enforce this and not enforce this when they are both causing the similar kind of problem.

Q. So would your instructing Mr. Lafon to enforce the ban against the Confederate flag without exception but not instructing him to enforce the ban against other flags without exception be viewpoint discrimination?

A. Flags are not generally offensive to people. They are in the Rebel flag. But that—if it causes, and I remember us talking about this, if there is something worn by a student

of the other side or whichever side that is offensive to the other group, you know, you are to consider that as well.

Q. So the operative term here is offensive, whether or not it is offensive to other students?

A. And it causes disruption as opposed to that.

Q. So similar symbols that aren't offensive wouldn't be banned?

A. If they weren't—the criteria in the policy is, and it says that, this is a—it talks about this being a guideline and that at any time things that are disruptive or which adversely affect educational atmosphere can be dealt with. It gives the Principal that latitude and that is what I have instructed him to do is use that latitude. When it became disruptive and offensive to a group to the point with it was disruptive to consider that as well.

Q. And that disruption is solely within the discretion of the Principal on a day-to-day basis?

A. It is to some extent and some extent it is not. If it causes a teacher to have to stop what they are doing and stop instruction and they have to deal with it or get between two students and referee, then that part is, that part is not in his, you know—

Q. Discretion?

A. –discretion. It is there. If there is an atmosphere created and you hear rumors, I don't like this T-shirt, I am

Sooner or later if it is offensive. If you know it is offensive, you deal with it.

Q. Okay. If you became aware that the Confederate flag was no longer causing disruption at William Blount High School, would you still have Mr. Lafon enforce the ban against the Confederate flag?

A. Yes.

Mr. Irion: Now I am done. Thank you. Any follow up?

FURTHER THIS DEPONENT SAITH NOT.

(Signature waived)

Part L
Partial Deposition Transcript of Steve Lafon, January 3, 2007

DEPOSITION OF STEVEN ODELL LAFON

January 3, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

Civil Action
No. 3:06-CV-75 (VARLAN/SHIRLEY)

Q. Who makes that decision?
A. Who makes the decision on what is disruptive or what could be disruptive?
Q. Yes.
A. On the day-to-day process, I do.
Q. Okay. An you would – what would you base that decision on, obviously that is disruptive?
A. Right.
Q. And what kind of things would you be considering to make that kind of determination on a day-to-day basis.
A. Well, besides just the cold-hard facts, as you say, that it is a disruption, based on what has been going on and what is going on, rather I and the other Principals feel like it is something that would be disruptive.
Q. So, the American flag is not banned at William Blount High School?
A. Right.
Q. Would the Canadian flag be banned?
A. It is not at the present time.
Q. What about a state flag, say a California flag?
A. Depending on what the circumstances were, it could be yes or no, you know, again, there could be something that comes up that could cause that to be a disruption; but under normal process, no.
Q. It wouldn't be banned on a day-to-day basis for no

A. There is not for just –

Q. There is not a blanket ban?
A. No.
Q. Okay. What about political buttons, is there a ban on political buttons?
A. No, not per se.
Q. Okay. How about political logos, say a political candidate T-shirt?
A. Again, not if it is not disruptive.
Q. Can you think of any specific instances where political logos or flags have resulted in a student being cited or disciplined?
A. Ask that again.

Q. Can you think of any specific instances where political logos or flags have resulted in a student being cited or disciplined?
A. I can't think of a specific one at this point, no.
Q. Okay. How about a specific instance of a student being cited for wearing a political button?
A. I don't know of it.
Q. So you said that you have been at William Blount High School your entire career?
A. Educational career, yes.
Q. What would be a promotion for you?

A. Yes.

Q. And why was that on the agenda?
A. Because we had just came through the year before which we have already talked about and we felt that it was particularly important that we talk about disruption and the rebel flag being one of those.
Q. Okay. What did you tell the students about the Rebel flag at the meeting?
A. I don't know exactly what I told them. I told them they would not be allowed to use, the would not be allowed to have Rebel flags or symbols of Rebel flags on their clothing, or anything else that was a disruption to the school.
Q. Okay. And did you at that time inform them that the Rebel flag, that any depiction of the Rebel flag was not allowed at the school?
A. In essence, yes.
Q. Okay. Did you mention specifically any other flags at that meeting?
A. No.
Q. Why not?
A. Because there wasn't any other flags at that point that were causing a disruption or that we knew had caused a disruption in the previous year.
Q. So no other flags are specifically banned across-the-board without exception; is that correct?

A. That is true.

Q. And the Confederate flag is banned and there are no exceptions; is that correct?
A. At this point, yes.
Q. Did you discuss any other types of symbols or speech that would be a violation of school rules?
A. Yes, I just said in general that, you know, anything that is a disruption to the school learning environment would not be tolerated.
Q. Were you personally served with a complaint and summons in this case?
A. In which case?
Q. In the Confederate flag case?
A. Yes.
Q. Do you remember that day?
A. I don't.
Q. Where were you when you were served?
A. At the front desk I think the way I remember it, they called me to the front desk and the person serving it on myself walked back to my office. I don't know if I had to sign for it or what, laid it down on my desk I remember.
Q. Was anybody else around at the time?
A. Yes.
Q. Who?
A. Well, the person at the front desk who would have had.

(2)

FILED
JUL 16 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1325

In The
Supreme Court of the United States

DEREK BARR, et al.,

Petitioners,

v.

STEVE LAFON, Individually and in His Official Capacity as Principal of William Blount High School, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

ROBERT N. GODDARD
GODDARD & GAMBLE
101 W. BROADWAY, SUITE 208
MARYVILLE, TN 37803
(865) 982-6731

GARY M. PRINCE
O'NEIL, PARKER & WILLIAMSON
P. O. BOX 217
KNOXVILLE, TN 37901-0217
(865) 546-7190

LAJUANA G. ATKINS
Counsel of Record
NORMAN H. NEWTON
CRAWFORD, CRAWFORD & NEWTON
P.O. BOX 4338
MARYVILLE, TN 37802-4338
(865) 982-5431

Counsel for Respondents

July 16, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RESTATED QUESTIONS PRESENTED

I. Whether a content-based restriction on student speech that satisfies the *Tinker* standard of a reasonable forecast that the restricted speech will substantially and materially disrupt schoolwork and school discipline is narrowly tailored to the state and the school's substantial interest in educating students.

II. Whether the "offensiveness" of a symbol that has been associated with racial prejudice, coupled with a racially hostile school environment, can contribute to the analysis of whether the presence of the symbol will substantially and materially disrupt schoolwork and school discipline or collide with the rights of other students.

III. Whether restriction on student speech can be justified via a "heckler's veto," an issue that was not raised, preserved or decided below.

TABLE OF CONTENTS

RESTATED QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

JURISDICTION 1

STATEMENT OF THE CASE 1

I. Procedural Background 1

II. Relevant Facts 2

REASONS FOR DENYING THE PETITION 4

I. The Court Does Not Have Authority to Review the Present Case 4

A. The Case or Controversy Limitation of Article III of the United States Constitution Renders this Case Moot 4

B. The Issue of a "Heckler's Veto Was Not Raised, Preserved or Decided Below, and No Evidence of a "Heckler's Veto" Exists in the Present Case 6

II. The Sixth Circuit's Decision Does Not Involve an Unsettled Question of Federal Law or Conflict with Supreme Court Precedent 7

A. The School's Need to Maintain the Discipline and Learning Environment Necessary to Accomplish Its Educational Mission as a Substantial Governmental Interest 8

B. The Reasonable Forecast of Disruption Announced in *Tinker* is the Narrowly Tailored Restriction on Student Speech 10

III. The Sixth Circuit Court of Appeals' Decision Does Not Create a Conflict among the Federal Circuits 12

A. The Federal Circuits Uniformly Apply the *Tinker* Standard 12

B. This Court Declined to Review This Issue in a Similar Case From the Eleventh Circuit 14

IV. The Sixth Circuit Court of Appeals' Decision Was Correct and Accurate; the Right Result Was Reached 17

A. The Sixth Circuit Properly Analyzed the Evidence and Did Not Create Any Irrebuttable Presumptions 17

1. The Sixth Circuit's analysis regarding "offensiveness" of the symbol did not create any presumption 17

2. The Sixth Circuit's analysis of the "disruptive potential" of the symbol did not create any presumption 18

B. The Sixth Circuit Properly Analyzed the Evidence Regarding *Tinker*'s Collision with the Rights of Other Students to Be Secure and Let Alone 19

CONCLUSION 19

APPENDIX

Appendix A: Affidavit of Alvin L. Hord (without exhibits), April 3, 2007 ..... 1b

Appendix B: Deposition Excerpts of Derek Mathias Barr, January 12, 2007 ..... 6b

Appendix C: Deposition Excerpts of Chris Nicole White, January 12, 2007 ..... 8b

Appendix D: Deposition Excerpts of Roger Craig White, January 12, 2007 ..... 11b

Appendix E: Pertinent Pages of Proposed Pretrial Order, May 4, 2007 ..... 14b

Appendix F: Petitioners' Pray for Relief in Complaint, March 2, 2006 ..... 17b

Appendix G: Petitioners' Issues Presented in Appeal Below, November 28, 2007 ..... 21b

Appendix H: Petitioners' Issues Presented in Petition for Rehearing, September 25, 2008 . 29b

TABLE OF AUTHORITIES

CASES

Bachellar v. Maryland,
397 U.S. 564 (U.S. 1970) 6

Barr, et al. v. Lafon, et al.,
538 F.3d 554 (6th Cir. 2008), *reh'g denied by Barr v. Lafon*, 553 F.3d 463 (6th Cir. 2009) . . . 2, 8, 11

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) 9

Blackwell v. Issaquena County Bd. of Educ.,
363 F.2d 749 (5th Cir. 1966) 14

Burnside v. Byars,
363 F.2d 744 (5th Cir. 1966) 14

Butts v. Dallas Indep. Sch. Dist.,
436 F.2d 728 (5th Cir. 1971) 13

Canady v. Bossier Parish Sch. Bd.,
240 F.3d 437 (5th Cir. 2001) 10

Chandler v. McMinnville Sch. Dist.,
978 F.2d 524 (9th Cir. 1992) 13

D.B. ex rel. Brogdon v. Lafon,
207 F. App. 518 (6th Cir. 2007) 2

Guiles ex rel. Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006) 13

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592
(1988) 9, 12, 13, 17

Henerey v. City of St. Charles,
200 F3d. 1128 (8th Cir. 1999) 13

Jacobs v. Clark County Sch. Dist.,
526 F.3d 419 (9th Cir. 2008) 10

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 4

Morse v. Fredrick,
127 S. Ct. 2618 (2008) 9, 12, 17

North Carolina v. Rice,
404 U.S. 244 (1971) 4

Powell v. McCormack,
395 U.S. 486 (1969) 5

Scott v. Sch. Bd. of Alachua County,
324 F.3d 1246 (11th Cir. Fla. 2003), *cert. denied*
by Scott v. Sch. Bd., 540 U.S. 824 (2003) 16

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) . . . . . *passim*

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (U.S. 1980) 5

Weinstein v. Bradford,
423 U.S. 147 (1975) (per curiam) 5

West v. Derby Unified Sch. Dist. No. 260,
206 F.3d 1358 (10th Cir. 2000) 13

STATUTES

42 U.S.C. § 1983 1

RULES

Sup. Ct. R. 10 . . . . . 4, 18

OTHER AUTHORITIES

Monaghan, Constitutional Adjudication: The Who
and When, 82 Yale L. J. 1363 (1973) 6

JURISDICTION

The mootness doctrine may deprive the Court of jurisdiction. See discussion of mootness doctrine below.

STATEMENT OF THE CASE

I. Procedural Background

On March 2, 2006, the Petitioners filed this civil rights action under 42 U.S.C. § 1983 in the United States District Court, Eastern District of Tennessee at Knoxville, alleging that their First Amendment Freedom of Speech right and their Fourteenth Amendment Equal Protection and Due Process rights were violated when the Respondent school officials banned the wearing or display of the Confederate flag during school hours. The Petitioners concomitantly filed a motion for preliminary injunction and temporary restraining order. On March 13, 2006, Respondents filed a response in opposition to the motion for preliminary injunction and temporary restraining order.

On May 4, 2006, a motion hearing was held and argument was heard on the motion for preliminary injunction and temporary restraining order. On June 6, 2006, the District Court entered its "Memorandum and Opinion" and its "Order" denying the motion for preliminary injunction and temporary restraining order. The Petitioners timely appealed the denial of injunctive relief. Oral argument was heard. On February 21, 2007, a panel of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed the District Court's denial of the Petitioners'

motion for preliminary injunction. *D.B. ex rel. Brogdon v. Lafon,* 207 F. App. 518 (6th Cir. 2007) (unpublished) (per curiam).

On February 10, 2007, the Petitioners filed a motion for summary judgment. On April 5, 2007, the Respondents filed a motion for summary judgment. On May 24, 2007, in an oral ruling, the District Court denied the Petitioners' motion for summary judgment and granted the Respondents' motion for summary judgment. On May 31, 2007, the District Court entered its judgment and dismissed the action with prejudice.

The Petitioners appealed the denial of their motion for summary judgment and the grant of the Respondents' motion for summary judgment. On April 22, 2008, oral argument was heard. On August 20, 2008, the Sixth Circuit panel issued its opinion affirming the District Court's decision. *Barr, et al., v. Lafon, et al.,* 538 F.3d 554 (6th Cir. 2008), *reh'g denied* by *Barr v. Lafon*, 553 F.3d 463 (6th Cir. 2009).

II. Relevant Facts

During the 2004-2005 school year, William Blount High School (WBHS), with a student population of approximately 1,750 students of which less than ten percent (10%) were African-American, Pet. App. 5a, experienced physical altercations between Caucasian students and African-American students and multiple racially motivated threats against African-American students. App. 3b. On April 7, 2005, due to threats of violence against African-American students and at the request of Alvin Hord (Hord), Superintendent of Blount County Schools, WBHS was "locked down" by

deputies from the Blount County Sheriff's Office in attendance. *Id.*

Bathroom graffiti at WBHS contained a threat to kill African-Americans on a specific date and was linked to the KKK. Pet. App. 8a. Other graffiti found on a bathroom stall stated "niggers 'hang em'" **accompanied by drawings of a noose and a Confederate flag**. *Id.* **"The south will rise again!!!** and when we do look out cause will (sic) rule the world!!! GIT-R-DONE SON!" was directly above this graffiti. *Id.*

After consideration of all these incidents and other facts, Hord determined that the wearing or displaying of racially divisive symbols, including the Confederate flag, by students during school hours was disruptive to the educational process at WBHS. App. 4b. The disruptive effect was evidenced by high absenteeism resulting from the fears of the parents and students. *Id.*

During an assembly at the beginning of the 2005-2006 school year, students were informed that due to the racial hostility, wearing or displaying of racially divisive symbols, including specifically the Confederate flag, would be a violation of the dress code policy. Pet. App. 4a. Even so, Appellants D.B. and C.W. violated the policy by wearing clothing bearing the image of the Confederate flag. Pet. App. 12a.

The Petitioners admit to a prior history of racially related violence and threats of violence at WBHS. Pet. App. 25. Even though the Petitioners allege that the ban is viewpoint specific, the Petitioners admit that racially divisive symbols other than the Confederate

flag are dealt with by the Respondents in the same manner as the Confederate flag. Pet. App. 44a, 45a.

REASONS FOR DENYING THE PETITION

The decisions below do not implicate a federal question that has not been decided by this Court nor do they conflict with a decision of this Court or any Court of Appeals. Additionally, as recently as 2003, this Court declined to review an analogous case applying the legal precedent to similar facts. Accordingly, the Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition for Writ of Certiorari to be granted. *See* Sup. Ct. R. 10.

I. The Court Does Not Have Authority to Review the Present Case.

A. The Case or Controversy Limitation of Article III of the United States Constitution Renders this Case Moot.

Article III of the United States Constitution denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)(quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *id.* When there ceases to be a controversy between the litigating parties due to events occurring after the trial court has rendered judgment, the decision of an appellate court

would be a mere academic exercise, and the court may not decide the appeal.

The Petitioners were minors when their complaint was filed, but now are all majority age. Pet. App. ii; App. 7b, 10b, 13b, 15b. None of the Petitioners attend WBHS or any other school operated by the Respondents. App. 17b.

The "capable of repetition yet evading review" exception to mootness, does not apply here. "This extremely narrow exception to the mootness doctrine is applicable only where: 1) the challenged action is too short in duration to be fully litigated before the case will become moot; and 2) there is a reasonable expectation that the complaining party will be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam).

Even if the Petitioners could satisfy the first prong of the exception, the youngest of the Petitioners would now be nineteen and unlikely to return to the Respondents' school system. App. 13b. The Petitioners filed the complaint for themselves only, not also on behalf of any other similarly situated students. Pet. ii. The Respondent school officials no longer have the power or opportunity to adversely affect any Petitioners' constitutional rights. Consequently, the Petitioners are subject to no ongoing harm or controversy for the Court to remedy.

[M]ootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-396 (U.S. 1980) (quoting *Powell v. McCormack*, 395

U.S. 486, 496 (1969)). One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

In their complaint, the Petitioners prayed for damages, according to proof, declaratory judgment and injunctive relief. App. 19b, 20b. No proof of damages is available in the record. No declaratory judgment or injunctive relief is available to Petitioners because they are no longer in an adversarial position to the Respondents, and the Petitioners sought no nominal damages. *Id.* Accordingly, this case is moot and therefore non-justiciable.

B. The Issue of a "Heckler's Veto Was Not Raised, Preserved or Decided Below, and No Evidence of a "Heckler's Veto" Exists in the Present Case.

In First Amendment law, a "heckler's veto" is the suppression of speech by the government because of the possibility of a **violent reaction** by hecklers. *See*, *Bachellar v. Maryland*, 397 U.S. 564, 567 (U.S. 1970) (emphasis added).

The Petitioners seek review by the Court of an issue they never raised until their Petition for a Writ of Certiorari. App. 22b-36b. In fact, the Petitioners seize onto the term from Chief Judge Boggs' dissents from the denials of rehearing en banc. Pet. App. 70a, 116a, 118a. The dicta in his dissents about the

problems he perceives with *Tinker* does not address any proof offered by the Petitioners or any reasoning used by the school officials in determining to ban racially divisive symbols that they reasonably forecast would substantially and materially disrupt schoolwork and school discipline or impinge on the rights of other students.

The record is devoid of any evidence of a "heckler's veto". Increased absenteeism caused by the fear and apprehension inherent in an insidious racially charged atmosphere cannot equate to a "heckler's veto." App. 4b.

The courts below did not decide any issue involving a "heckler's veto." Accordingly, the Court has no basis for review, and the petition should be denied.

II. The Sixth Circuit's Decision Does Not Involve an Unsettled Question of Federal Law or Conflict with Supreme Court Precedent.

The Petitioners proffer questions regarding strict scrutiny as applied using the *Tinker* standard, particularly regarding the school's educational mission as a significant governmental interest and the forecast of disruption as narrowly tailoring the restriction on student speech. The Court has addressed and settled those questions in previous opinions. The decision below properly applies those precedents to the facts of this case without violation or abrogation of those precedents.

A. The School's Need to Maintain the Discipline and Learning Environment Necessary to Accomplish Its Educational Mission as a Substantial Governmental Interest.

The Petitioners misstate the substantial government interest that the Sixth Circuit decision addressed. The Sixth Circuit did not designate the school's broad educational mission as the substantial governmental interest. Instead, the Sixth Circuit evaluated the restricted speech under the same interest that was present in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the maintenance of the discipline and learning environment necessary to accomplish the school's educational mission.

"Plaintiffs-Appellants' claims lead us to wrestle with a most difficult question: how to balance some students' rights to free speech with 'the rights of other students to be secure and to be let alone,' taking into account the authority of school officials to maintain the discipline and learning environment necessary to accomplish the school's educational mission." *Barr v. Lafon*, 538 F.3d 554, 562 (6th Cir. Tenn. 2008) (quoting *Tinker*, 393 U.S. at 508.) "Therefore, our inquiry in this case is whether the ban on clothing depicting the Confederate flag 'is necessary to avoid material and substantial interference with schoolwork or discipline.'" *Id.* at 564 (quoting *Tinker*, 393 U.S. at 511).

The Sixth Circuit held that the substantial governmental interest in this case as in *Tinker* was to

"avoid material and substantial interference with schoolwork or discipline", and "to maintain the discipline and learning environment necessary to accomplish the school's [broader] educational mission." *Id.* at 562, 564.

The Sixth Circuit evaluated the Court's holdings in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), cases presenting exceptions to the stringent *Tinker* standard, and determined that *Tinker* was the applicable standard in the instant case. *Id.* at 563-64.

The Sixth Circuit decision evaluated *Morse v. Fredrick*, 127 S. Ct. 2618 (2008), and referenced that "Justice Alito also makes clear that he joins the majority only insofar as 'the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions' beyond those articulated in *Tinker, Fraser*, and *Hazelwood*." *Id.* at 564 (quoting *Morse*, 127 S. Ct. at 2637). Therefore, the Sixth Circuit's well-reasoned analysis negates the Petitioners contention that "[b]y establishing that the school's 'mission to educate its students' is the significant government interest, . . . epitomizes the danger predicted by Justices Alito and Kennedys' [sic] concurring opinion in *Morse*". Pet. 6.

Therefore, the Sixth Circuit decision does not involve an unsettled question of federal law or conflict with Supreme Court precedent. Accordingly, review by the Court is unfounded, and the petition should be denied.

B. The Reasonable Forecast of Disruption Announced in *Tinker* is the Narrowly Tailored Restriction on Student Speech.

The Petitioners misunderstand the Court's student speech jurisprudence. The Petitioners ask the Court to require more than announced in *Tinker* and even aver that the Fifth Circuit and Ninth Circuit established a new "intermediate" standard regarding student speech.

In the Fifth Circuit case, *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), parents of students argued that the dress code established by the school board, requiring mandatory uniforms, violated their children's right to free speech under the First and Fourteenth Amendments. *Id.* at 439. Because the dress code was content neutral, the *Canady* court held that the traditional "time, place and manner" test should applied. *Id.* at 443.

Neither the Fifth Circuit nor the Ninth Circuit case, *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008), establish a new standard regarding school speech, but merely decline to impose the more stringent *Tinker* burden on the school officials because the restricted speech did not address a content-based restriction that can only be justified under the "material and substantial interference with schoolwork or discipline".

The Ninth Circuit, in evaluating the school uniform issue held:

> Although Tinker did not equate its "substantial interference" test with the "strict scrutiny test" that is now commonly used in First Amendment cases (perhaps because that terminology was not in common parlance at the time, see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (earliest Supreme Court case using this terminology in the free speech context)), Plaintiffs' argument rests on the "substantial interference" test being more difficult to withstand than the intermediate scrutiny test.

Id. at 429.

The Court's holding in *Tinker*, clearly demonstrated that "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. (U.S. 1969). The Court held that "the prohibition of expression of one particular opinion, at least without evidence that it is **necessary to avoid material and substantial interference with schoolwork or discipline**, is not constitutionally permissible." *Id.* at 511 (emphasis added to highlight the narrowly tailored requirement to meet the governmental interest).

The Sixth Circuit did not eliminate the narrowly tailored requirement by finding, "Our inquiry, then, is whether the school reasonably forecast that the Confederate flag would cause material and substantial disruption to schoolwork and school discipline." *Barr*,

538 F.3d at 565. Accordingly, review by the Court is unfounded, and the petition should be denied.

III. The Sixth Circuit Court of Appeals' Decision Does Not Create a Conflict among the Federal Circuits.

The opinions below conform with precedent of this Court and other circuits that have addressed the issue applying *Tinker* and its progeny. In *Tinker,* the Court addressed the issue of content-based restriction on student speech in the context of public schools, and the federal circuits uniformly apply the standard in cases with similar facts or distinguish cases with different facts; however, no palpable conflict exists.

A. The Federal Circuits Uniformly Apply the *Tinker* Standard.

In *Morse*, the Court's most recent student speech case, Justice Roberts outlined the *Tinker, Fraser, Hazelwood* framework, and in his concurrence, Justice Alito reiterated that school speech cases are decided by applying the precedents articulated in *Tinker, Fraser*, and *Hazelwood*.

Student speech pursuant to the First Amendment presents courts with very complex issues, so most all courts deciding such issues begin with this trilogy of cases to determine into which its analysis belongs. The courts that have applied *Tinker* have done so uniformly.

The Sixth Circuit applied *Tinker* in the present case by distinguishing the facts in each case to reach a different conclusion without violation to the

standard. In its analysis, the Sixth Circuit looked to a case in the Tenth Circuit that presented similar facts. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365-67 (10th Cir. 2000) (denying an injunction sought by the parents of a student who was suspended for drawing a confederate flag in school). The Second Circuit summarized the holdings of the original three Supreme Court decisions and held for all other speech, meaning speech that is neither vulgar, lewd, indecent, or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate student speech unless it would materially and substantially disrupt classwork and discipline in the school. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) (citations omitted).

In *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992), for example, a middle school punished students who wore "SCAB" buttons to protest replacement teachers during a strike. Applying *Tinker* because the school had failed to present any evidence that the buttons were "inherently disruptive" to school activities, the court held that students could proceed with their First Amendment claim. The Eighth Circuit views *Tinker* as allowing school officials to "restrict even individual student expression that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or that would substantially interfere with the work of the school or impinge upon the rights of other students." *Henerey es rel. Henerey v. City of St. Charles*, 200 F3d. 1128, 1132 (8th Cir. 1999).

Butts v. Dallas Independent School Dist., 436 F.2d 728, 729-730 (5th Cir. 1971) referred to companion

cases in its court: *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); and *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) applying *Tinker* to two differing sets of facts with two different outcomes based upon the facts. Both involved prohibition against wearing SNCC buttons, by the school authorities. In *Burnside* there was no disruption and the authorities were enjoined. In *Blackwell* there was disruption, and the complaint was dismissed. The duty of the courts in future cases of the same kind therefore seems clear enough, and the trial judge properly proceeded to examine in detail the alleged disruptions and threats of disruption that were considered by the Dallas School Officials on and just before October 15, 1969.

The circuits all interpret the holding in *Tinker* uniformly and apply it to the facts of their cases to determine the outcome, which may be analogous to or distinguishable from *Tinker*. Likewise, the Sixth Circuit distinguished the facts in the present case from the facts in *Tinker* and cases from the Eleventh, Third and Fifth Circuits, Pet. App. 32a-33a; but the panel properly applied *Tinker*. Accordingly, review by the Court is unfounded, and the petition should be denied.

B. This Court Declined to Review This Issue in a Similar Case From the Eleventh Circuit.

As recently as 2003, this Court declined to review an Eleventh Circuit decision in which the grant of the school board's motion for summary judgment was

affirmed based upon the application of the standards in both *Tinker* and *Fraser*[1] concluding that

> [S]chool officials can appropriately censure students' speech under either of the following two theories. First, from the *Tinker* case, school officials are on their most solid footing when they reasonably fear that certain speech is likely to "appreciably disrupt the appropriate discipline in the school." *Denno v. School Bd. Of Volusia County* , 218 F.3d 1267, 1271, (citing *Tinker*, 393 U.S. at 514). Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government." To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption. *Denno*, 218 F.3d at 1271. As the Supreme Court stated in *Fraser*:
>
> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate

---

[1] The Sixth Circuit explicitly rejected the *Fraser* analysis regarding offensiveness in the present case. App. 32a (A footnote in the decision explaining and distinguishing holdings from other circuits).

> highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U.S. at 508, 89 S. Ct. at 737.... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. Fla. 2003), *cert. denied by Scott v. Sch. Bd.*, 540 U.S. 824 (2003).

The *Scott* Court found "the ban on the display of Confederate symbols was not unconstitutional" because "[s]chool officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the action underlying this case." *Id.* at 1249. The facts presented in *Scott* are similar to those in the present case; yet, the evidence in *Scott* appears much more scant and based upon not only the reasonable forecast of disruption but also upon "hurt feelings, emotional trauma and outright violence which the display of the symbols involved . . . could provoke." *Id.*

No significant legal developments have taken place since this Court denied the Petition for a Writ of Certiorari in *Scott*. Accordingly, review by the Court is unfounded, and the petition should be denied.

IV. The Sixth Circuit Court of Appeals' Decision Was Correct and Accurate; the Right Result Was Reached.

The decisions below properly applied the relevant legal precedents in this case without creating conflict with any decision of this Court or the federal circuits.

A. The Sixth Circuit Properly Analyzed the Evidence and Did Not Create Any Irrebuttable Presumptions.

1. The Sixth Circuit's analysis regarding "offensiveness" of the symbol did not create any presumption.

As most courts do, the Sixth Circuit began its analysis by discussing the precedents within the *Tinker, Fraser, Hazelwood* framework. In the discussion of the trilogy, the court noted that this Court's recent *Morse* decision cautioned against broad application of the "plainly offensive" standard in *Fraser*, which should be limited so as not to encompass "political and religious speech [that] might be perceived as offensive to some." Pet. App. 19a. As noted supra in footnote 1, the court explicitly refused to apply such standard in the present case because "we disagree that a display of the Confederate flag constitutes vulgar or 'plainly offensive' speech under *Fraser*. Pet. App. 32a.

Additionally, the court cautioned that its decision "does not establish a precedent justifying a school's ban on student speech merely because other students find that speech offensive . . . '. The court

conscientiously avoided any validation of the ban in the present case simply because other students may be offended by the banned symbol's presence. Consequently, the court did not create any presumption, much less an irrebuttable presumption as the Petitioners aver.

Accordingly, review by the Court is unfounded, and the petition should be denied.

2. The Sixth Circuit's analysis of the "disruptive potential" of the symbol did not create any presumption.

The Petitioners aver that the Sixth Circuit created several presumptions as to the "disruptive potential" of the Confederate flag. *See* Pet. 25. However, the Sixth Circuit did not create any presumptions; it merely drew inferences from the evidence. In fact, the "Petitioners are not challenging here the District Court's conclusions regarding these presumptions, or the Circuit Court's refusal to find error regarding those conclusions." *Id.*

If as the Petitioners state, the conclusions drawn from the presumptions do not merit challenge, then the effect of any so-called presumptions is valid. In truth, the Petitioners are asking the Court to do what the district court and two Sixth Circuit panels have done— review the facts in evidence for error. *Id.*

Pursuant to Supreme Court Rule 10, that is not the function of this Court's review and does not demonstrate "compelling reasons" for the petition to be

granted. Accordingly, review by the Court is unfounded, and the petition should be denied.

B. The Sixth Circuit Properly Analyzed the Evidence Regarding *Tinker*'s Collision with the Rights of Other Students to Be Secure and Let Alone.

The Petitioners aver that the Sixth Circuit ignored and reached beyond the evidence presented to create a "new right: the right to not be (sic) offended. Pet. 26. However, as discussed in Section IV. A. 1. *supra*, the court conscientiously avoided any validation of the ban based on the symbol's perceived offensiveness.

Again, the Petitioners are asking the Court to review the facts presented in the case as reviewed by two Sixth Circuit panels, which both denied rehearing, and rehearing en banc was denied twice. Accordingly, review by the Court is unfounded, and the petition should be denied.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

LAJUANA G. ATKINS
Counsel of Record
NORMAN H. NEWTON
CRAWFORD, CRAWFORD & NEWTON
P. O. Box 4338
Maryville, TN 37802-4338
(865) 982-5431

ROBERT N. GODDARD
GODDARD & GAMBLE
101 W. Broadway, Suite 208
Maryville, TN 37803
(865) 982-6731

GARY M. PRINCE
O'Neil, Parker & Williamson
P. O. Box 217
Knoxville, TN 37901-0217
(865) 546-7190

Counsel for Respondents

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 3:06-CV-75

[Dated April 3, 2007]

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., minors, by and through their parent and guardian, ROGER WHITE,

Plaintiffs,

vs.

STEVE LAFON, in his individual and official capacity as Principal of William Blount High School; ALVIN HORD in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Defendants.

AFFIDAVIT OF ALVIN L. HORD

STATE OF TENNESSEE
COUNTY OF BLOUNT

Alvin L. Hord, being first duly sworn makes oath in due form of law as follows:

1. That I am Alvin L. Hord, the duly appointed Director of Schools of the Blount County School System, that the information contained in this Affidavit is based upon my own personal knowledge and the records of the Blount County School Board, that I am the custodian of those records, and that I am competent to testify as to these matters.

2. The policy of the Blount County middle schools and high schools, including William Blount High School, relative to dress codes is attached hereto and incorporated by reference as Exhibit 1. This policy was in effect and was enforced by the Blount County School Board at all times material to this litigation. The policy is enforced evenly and in a non-viewpoint specific manner during the school hours. This policy was adopted upon the recommendation of the Tennessee School Board Association.

3. The Blount County School System has two (2) high schools – William Blount High School and Heritage High School. Racially motivated incidents, including violence and/or threats of violence, have occurred in these schools leading up to calendar year 2005-2006 and include the following:

(a) On February 22, 2005, there was a physical altercation between a white student and an African-American student. The altercation resulted in a racial harassment complaint filed against the Blount County School Board with the United States Department of Education, Office of Civil Rights by the

family of the African-American student, which matter is now closed.

(b) From February 22, 2005, through the remainder of the school year, multiple racially motivated threats and physical altercations among students at both Blount County high schools occurred and resulted in disciplinary actions to the appropriate students, including suspension of the students from the Blount County schools. Resulting from some of these altercations were two (2) additional complaints filed by parents of African-American students to the Office of Civil Rights charging racial discrimination and harassment in the Blount County schools. These latest filed complaints are presently stayed in the Office of Civil Rights due to the pending civil action in this Court styled *John Cleveland, el al v. Blount County School District 00050, et al*, Civil Action No. 3:05-CV-380. *Cleveland* alleges that William Blount High School is a racially hostile educational environment. *(Cleveland* Complaint ¶ 12.) A copy of the *Cleveland* Complaint and Amended More Definite Statement are attached hereto as Exhibit 2.

(c) During the school year of 2005-2006, there have been two (2) additional complaints to the Blount County School Board alleging racial harassment.

4. Due to the racial tension and threats of violence against African-American students that existed at William Blount High School on April 7, 2005, the school was "locked down" at my request by deputies from the Blount County Sheriff's Office, and the presence of deputy sheriffs at William Blount High School continued until the end of the school year.

5. When making the decision to ban racially divisive symbols, including the Confederate flag, I relied upon numerous conversations with students and parents of students which revealed that students were taunted by the Confederate flag and were fearful for their safety as a result of the racial tensions at William Blount High School. The parents' and the students' fears were evidenced by a dramatic increase in absenteeism during the time of racial tension prior to the lockdown and the ban.

6. After much consideration of the parents' and students' concerns regarding the aforementioned incidents, consultation with community leaders and diversity training, I determined that the wearing of clothing depicting racially divisive symbols, including the Confederate flag, by students during school hours had a significant disruptive effect on the proper educational environment of the students at William Blount High School.

7. The decision to ban the wearing of clothing depicting the Confederate flag and other racially divisive symbols was based partly upon the information provided by the Blount County Sheriff's Office and specifically recited in the affidavits of Deputy Joe Crisp, Deputy Andy Waters and Detective David Henderson.

8. In banning racially divisive symbols, I specifically included the Confederate Flag because it had been disruptive; however, the Principal of William Blount High School was instructed to ban any racially divisive symbols or flags that caused disruption or was likely to cause disruption.

9. I directed the principal at William Blount High School to enforce the dress code without viewpoint discrimination as to all racially divisive symbols.

10. There is approximately 1,750 students at William Blount High School and less than ten percent (10%) are African-American.

Affiant further saith not.

/s/
Alvin L. Hord

SWORN TO AND SUBSCRIBED before me this 3 day of April, 2007.

/s/ Nancy E. Allman
Notary Public
[SEAL]

My commission Expires:
10/04/10

APPENDIX B

IN THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 306-CV-75

[Dated January 12, 2007]

D.B., A minor by and through his parent and guardian, Sharon Brogdon, R.W. and C.W., minors, by and through their parents and guardian, Roger White,

Plaintiffs,

VS.

STEVE LAFON, in his individual and official capacity of William Blount High School, and ALVIN HORD, in his official capacity as Director of Schools, and BLOUNT COUNTY SCHOOL BOARD,

Defendants.

APPEARANCES:
VAN IRION,
Attorney for the Plaintiffs

ROBERT N. GODDARD,
LAJUANA G. ATKINS,

Attorneys for the Defendants,
Blount County School Board
and Steve LaFon and Alvin Hord
in their official capacities

GARY M. PRINCE,
Attorney for the Defendant,
Steve LaFon in his individual capacity

DEPOSITION OF DEREK MATHIAS BARR

JANUARY 12, 2007

* * *

[p.5]

Q. Are you a student at William Blount High school?

A. Not no more.

Q. Did you graduate?

A. No, I dropped out.

Q. Have you received your GED or you just dropped out of school?

A. No, I was in the middle -- I had started my classes at Everett but, of course, I had a kid, so most of my time has been spent at work.

Q. Okay.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 306-CV-75

[Dated January 12, 2007]

D.B., A minor by and through his parent and guardian, Sharon Brogdon, R.W. and C.W., minors, by and through their parents and guardian, Roger White,

Plaintiffs,

VS.

STEVE LAFON, in his individual and official capacity of William Blount High School, and ALVIN HORD, in his official capacity as Director of Schools, and BLOUNT COUNTY SCHOOL BOARD,

Defendants.

APPEARANCES:
VAN IRION,
Attorney for the Plaintiffs

ROBERT N. GODDARD,

LaJUANA G. ATKINS,
Attorneys for the Defendant,
Blount County School Board
and Steve LaFon and Alvin Hord
in their official capacities

GARY M. PRINCE,
Attorney for the Defendant,
Steve LaFon in his individual capacity

DEPOSITION OF CHRIS NICOLE WHITE

JANUARY 12, 2007

* * *

[p.3]

CHRIS NICOLE WHITE,

having been first duly sworn, was examined and deposed as follows:

EXAMINATION

BY MR. GODDARD:

Q. Would you give your full name, please, ma'am?

A. Chris Nicole White.

Q. Ms. White, I am Rob Goddard. Again, you heard me explain who I am and what I am. If you have any questions about or don't understand any of the questions that I'm asking, please stop me, and we'll start over or do whatever we need to do because I want

to make sure you understand what I'm asking you to give your answer; is that all right?

A. (Witness nods head affirmatively).

Q. And you'll need to -- instead of nodding your head, you'll need to give your answers verbally.

A. Okay.

Q. You have been here while the testimony of Derek Barr has been given. Have you heard that?

A. Yes.

Q. Is there anything that he testified to that you disagree with?

A. No.

Q. Where are you presently in school?

[p.4]

A. I'm a junior in the process of getting home schooled.

Q. You're a junior at William Blount High School?

A. Uh-huh (Affirmative).

Q. And you're in the process of getting home schooled; is that right?

A. Yeah.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 306-CV-75

[Dated January 12, 2007]

D.B., A minor by and through his parent and guardian, Sharon Brogdon, R.W. and C.W., minors, by and through their parents and guardian, Roger White,

Plaintiffs,

VS.

STEVE LAFON, in his individual and official capacity of William Blount High School, and ALVIN HORD, in his official capacity as Director of Schools, and BLOUNT COUNTY SCHOOL BOARD,

Defendants.

APPEARANCES:

VAN IRION,
Attorney for the Plaintiffs

ROBERT N. GODDARD,
LaJUANA G. ATKINS,
Attorneys for the Defendant,
Blount County School Board
and Steve LaFon and Alvin Hord
in their official capacities

GARY M. PRINCE,
Attorney for the Defendant,
Steve LaFon in his individual capacity

DEPOSITION OF ROGER CRAIG WHITE

JANUARY 12, 2007

* * *

[p.3]

ROGER CRAIG WHITE,
having been first duly sworn, was
examined and deposed as follows:

EXAMINATION

BY MR. GODDARD:

Q. Would you give your name for the record, please, sir?

A. Roger Craig White.

Q. Mr. White, my name is Rob Goddard, and I think you've heard me say to the others that if I ask a question that doesn't make any sense to you, you stop

me and I'll start over and -- whatever we need to do; is that agreeable?

A. Yes, sir.

Q. How old are you?

A. Seventeen.

Q. Are you presently in school?

A. Yeah.

Q. Where are you presently a student?

A. William Blount High School.

Q. Have you been at William Blount during your entire high school career?

A. Yeah.

Q. You heard the testimony that was given by

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

CIVIL ACTION NO: 3:06-CV-75

[Dated May 4, 2007]

D.B., a minor by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian, ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; and ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Defendants.

[p.1]

[PROPOSED] PRE-TRIAL ORDER

The Parties, pursuant to the Court's Scheduling Order, respectfully submit this Proposed Pretrial Order.

(A) JURISDICTION

Jurisdiction is founded upon 28 U.S.C. §§ 1331 and 1343 and is not in dispute.

(B) PLEADINGS

The pleadings are amended to conform to this Pretrial Order and this Pretrial Order supplants the pleadings.

* * *

[p.9]

10. On March 3, 2006, plaintiffs filed the subject lawsuit in the United states District Court of Tennessee under 42 U.S.C. § 1983, Civil Action 3:06-cv-75, alleging violations of their First Amendment and Fourteenth Amendment rights to free speech, equal protection, and due process.

11. The minor Plaintiffs are not now students of William Blount High School or any other school operated by the Defendants, however, at least one is a home-schooled student but is still eligible to enroll at William Blount High School.

12. Defendant Blount County School Board has adopted a dress code which prohibits, under Section 4f, "clothing which exhibits written,

pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation."

13. At the request of Defendant Alvin Hord, Superintendent of Blount County Schools, on April 7, 2005, William Blount High School was "locked down" with deputies from the Blount County Sheriff's Office in attendance.

14. Approximately 1750 students attend William Blount High School and less than 10% of that amount are African-Americans.

* * *

[p.11]

s/van R. Irion
Van R. Irion BPR# 024519
2327 Laurel Lake Road
Knoxville, Tennessee 37932
(865) 809-1505
Attorney for Plaintiffs

s/Robert N. Goddard
Robert N. Goddard (BPR #006789)
Attorney for Steve Lafon, in his official capacity,

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

CIVIL ACTION NO: 3:06-CV-75
Jordan/Shirley

[Filed March 2, 2006]

D.B.*, a minor by and through his parent and guardian, SHARON BROGDON, R.W.* and C.W.*, minors, by and through their parent and guardian, ROGER WHITE,	)
Plaintiffs,	)
v.	)
STEVE LAFON, in his individual and official capacity as Principal of William Blount High School; and ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,	)
Defendants.	)

* A reference list containing full names of minor plaintiffs has been filed under seal with the Court pursuant to local rule 7.3.

[p.1]

COMPLAINT

Introduction

This is a Complaint seeking remedies for violation of the Plaintiffs' First Amendment rights. Defendants, contrary to law and pursuant to facially unconstitutional policies, disciplined Plaintiffs based on the content of their expressive behavior when Plaintiffs attempted to express their pride in their southern heritage by wearing various clothing bearing images of the Confederate (rebel) flag. Plaintiffs seek damages, declaratory judgment and temporary and permanent injunctive relief to redress Defendants' violation of their rights under the First and Fourteenth Amendments of the United States Constitution.

* * *

[p.7]

THIRD CAUSE OF ACTION

(14th Amendment Due Process)

23. The actions of the Defendants, as set forth in paragraphs 1-18 above, which are fully incorporated herein, entitle the Plaintiffs to a remedy under 42 U.S.C. § 1983 because the Defendants have, under color of state law, violated Plaintiffs clearly established rights to due process guaranteed under the Fourteenth Amendment to the United States Constitution

as applied to the states and their political subdivisions, in that Defendants' policies are vague, overbroad, and lack sufficient standards and safeguards to curtail the discretion of school officials, thereby allowing Defendants unbridled discretion to enforce said policies in an ad hoc and discriminatory manner.

24. As a direct result of Defendant's actions, Plaintiffs have suffered direct and immediate violations of their constitutional rights and are therefore entitled to injunctive and declaratory relief, damages and reasonable attorneys' fees, pursuant to Federal Rules of Civil Procedure 57 and 65 and 28 U.S.C. § 2201; to redress and remedy the violations, and to prevent irreparable harm and future violations of their rights and the rights of others.

Prayer and Relief

WHEREFORE, Plaintiffs respectfully ask for judgment in their favor and against Defendants, including temporary and permanent injunctive relief; a declaration that the actions of Defendants, as described herein, were and are unconstitutional, illegal, and

[p.8]

void, and that the same were in contravention of Plaintiffs' constitutional rights; damages according to proof; and expungement of any references to any disciplinary action in the Plaintiffs' records relating to their wearing items bearing the flag, or otherwise displaying confederate symbols. Plaintiffs further asks

for judgment that Defendants reimburse Plaintiffs for their reasonable attorneys' fees, expenses, and costs associated with the maintenance of this action, pursuant to 42 U.S.C. § 1988, and all such further relief as the Court may deem just and proper.

Respectfully submitted,

/s/
Van R. Irion BPR# 024519
2327 Laurel Lake Road
Knoxville, TN 37932
(865) 670-1105 telephone & facsimile
Attorney for Plaintiffs

Dated: March 2, 2006

Of Counsel

Kirk D. Lyons
Federal Admission No. 8472
Southern Legal resource Center, Inc.
2 Arosa Court
P.O.Box 1235
Black Mountain, NC 28711
(828) 669-5189 telephone
(828) 669-5191 facsimile

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO: 07-5743

[Filed November 28, 2007]

DEREK BARR; CRAIG WHITE and CHRIS WHITE both minors, by and through their parent and guardian, ROGER WHITE,	)
Plaintiffs / Appellants,	)
v.	)
STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,	)
Defendants / Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

FINAL BRIEF OF THE APPELLANTS'
Oral Argument Requested

Van R. Irion
LAW OFFICES OF VAN R. IRION
2327 Laurel Lake Road
Knoxville, TN 37932
(865) 809-1505
Counsel for Appellants

See Next Page for Opposing Counsel

[p.2]

V. ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in granting defendants' motion for summary judgment

B. Whether the District Court erred in denying plaintiffs' motion for summary judgment based upon violation of equal protection

C. Whether the District Court erred by refusing to apply relevant legal standards

D. Whether the District Court erred by failing to grant plaintiffs all reasonable inferences from evidence presented prior to granting defendants motion for summary judgment

E. Whether the District Court erred by considering inadmissible evidence

* * *

[p.15]

Therefore, if the legal standards asserted by the plaintiffs are applicable to the case at bar, then plaintiff's motion for summary judgment should be granted and defendants' motion must be denied, *regardless* of any justification under *Tinker*.

1. The District Court's Rejection of the Supreme Court's *Mosley* Doctrine[1]

Justification of the defendants ban under the *Tinker* standard is simply the substantial-government-interest step in an equal protection analysis.

> "Cities certainly have a substantial interest in stopping picketing which disrupts a school. 'The crucial question, however, is whether [Chicago's ordinance] advances that objective in a manner consistent with the command of the Equal Protection Clause.' It does not. "*Mosley*, 408 U.S. at 99, (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

As in *Mosley*, the school's prohibition in the case at bar addresses the same substantial interest, preventing disruption in the school, but as in *Mosley* it does so in a manner that violates Equal Protection.

---

[1] For a more comprehensive review of the *Mosley* case and its applicability to the case at bar, please see Plaintiff-Appellants' Motion for Summary Judgment and Reply. (R. 57, p. 6-9, Supp.JA p.359; and R. 75, p. 3-9, Supp.JA p.438, respectively).

"Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school.

* * *

[p.19]

2. Banning "Racially Divisive Symbols" while Teaching Racial Inclusiveness is Per Se Viewpoint Discrimination

The *Mosley* opinion discussed viewpoint discrimination, but was primarily a case about content discrimination. For proper analysis content discrimination and viewpoint discrimination must be distinguished. While content discrimination within a regulation can sometimes be justified by showing a significant government interest *and* narrow tailoring, **viewpoint discrimination "is never permitted."** *Mosley,* 408 US. 92, 99; see also *R.A.V.*, 505 U.S. 377, 391-94.

Viewpoint discrimination is found when one expression of opinion on a topic is perfectly legal, but the expression of the opposite opinion is illegal. *R.A.V.*, 505 U.S. 377, 391-94. Content discrimination, on the other hand, is the prohibition of any discussion of a given topic itself, whether in support-of or opposed-to the particular subject. *Id.* For example, a regulation banning all discussions about politics is content specific. Whereas a regulation banning expressions of opinion in favor of one political party, but banning

expressions of opinion *against* the same political party, is viewpoint discriminatory.

Content discrimination is more general and inclusive, and therefore, more even-handed. Viewpoint discrimination is more specific and more onerous. This is why equal protection sometimes allows the former, but never allows the latter. *Id.*

The case at bar is an egregious violation that strikes at the very heart of the First Amendment. Regardless of any policy arguments in favor of diversity, regardless of any negative effects of racial intolerance, Americans have the right to express their views on topics such as race. The First Amendment was specifically intended to protect viewpoints that are unpopular. If such topics are likely to cause disruption in the school, then *the topic* may be banned. But proof of disruption does not grant the government the right to prohibit only expressions of the unpopular side of the discussion. If the government is allowed to assert its view on an issue, *and* it is also allowed to silence the opposing view, then we might as well take the First Amendment out of the Constitution.

3. The "Possibility" of Governmental Suppression of Particular Ideas is Enough to Presumptively Invalidate a Regulation

> "The government may not regulate use based on hostility--or favoritism–towards the underlying message expressed." *R.A.V.*, 505 U.S. 377, 386.

> "[The city] has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That *possibility* would *alone* be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevated the possibility to a certainty." *Id* at 394. (emphasis added).

* * *

[p.26]

the issues raised here.[3] The question was not asked in an attempt to prove that defendant Hord would, in fact, continue to have the ban enforced under the hypothetical circumstances. It was intended to establish defendant Hord's motives in enforcing the ban as he currently is. And the question served that purpose very well, as discussed above.

The District Court's failure to recognize the materiality of this question, and the defendants' other statements, illustrates the Court's failure to recognize the Constitutional requirements established by *Mosley*

---

[3] While hypothetical questions may not be used to prove the assumptions within the question, and may not be used to confuse the witness, the question presented here was neither confusing, nor asked to prove the underlying assumption. It was asked to clarify motive. Also note that "form-of-the-question" objections must be made at deposition to be preserved. The record shows that such an objection was not made, and is therefore waived.

and *R.A.V.*, related to acceptable *enforcement* of the defendants' ban. Again, the District Court's analysis of this case began and ended with a one-step determination of whether the defendants had produced any evidence that supported their initial justification under *Tinker*.

4. Conclusion on Legal Determinations

The defendant school wants to have its' cake and eat it too. It claims that "racially divisive" symbols are disruptive, and are therefore banned. But the only symbol that is banned all the time, without regard to circumstances, is the

* * *

[p.28]

conclusively eliminated the *possibility* that they are "seeking to handicap the expression of particular ideas."

d. The District Court Failed to Give the Plaintiffs Reasonable inferences[4]

In considering evidence, the Court "must give the non-movant the benefit of every reasonable inference." *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

---

[4] This discussion is a summary of evidence presented. For more complete discussions of the evidence please see plaintiffs' opposition to the defendants' motion for summary judgment. (R. 78, Supp.JA p.453).

> "The school bears the burden of demonstrating sufficient facts to support its forecast of substantial disruption." *Lowery v. Euverard*, __ F.3d__, No. 06-6172 (6th Cir. 2007), citing *Tinker*, 393 U.S. 503.

Since the defendants bear the full burden of proof regarding their motion, by granting the defendants' motion for summary judgment the District Court has determined that the defendants' evidence is so overwhelming that it sufficiently forecloses any reasonable possibility that the defendants' forecast of substantial disruption is incorrect. Yet a quick review of the relevant evidence shows that this conclusion is in dispute, at best:

No evidence was presented that the Confederate flag *ever* caused *any* disruption at the school.[5]

APPENDIX H

UNITED STATES DISTRICT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO: 07-5743

[Filed September 25, 2008]

DEREK BARR; CRAIG WHITE and CHRIS WHITE, by and through their parent and guardian, ROGER WHITE,

Plaintiffs/Appellants,

v.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Defendants/Appellees.

[p.1]

APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

I. STATEMENT FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure plaintiff/appellants hereby petition this Court for a rehearing with suggestion for rehearing en banc. Rehearing is requested from this Court's published opinion in the above-entitled case, entered August 20, 2008. See *Barr v. Lafon,* 07-5743 (6th Cir. Aug. 20, 2008).

The grounds supporting this petition include plaintiff-appellants respectful assertion that the panel decision conflicts with the United States Supreme Court's decisions in *Turner Broadcasting v. F.C.C.*, *R.A.V. v. City of St. Paul,*

* * *

[p.3]

III. GROUNDS

A. The Panel's Distinguishing of the Instant Case from *Mosley* is Contrary to Precedent

The panel's opinion distinguished the Supreme Court's *Police Department of City of Chicago v. Mosley* from the instant case by stating:

> "*Mosley* involved adult speech in a public forum, while the instant case involves student speech in a public school, which is a limited public forum. Thus, *Tinker* sets the guiding standard for the instant case while that was not true of *Mosley.*" *Barr,* slip op. at 18, *discussing* 408 U.S. 92 (1972).

The appellants respectfully assert that *Mosley* did, in fact, explicitly follow *Tinker*. *Mosley* is an extension of *Tinker*. *Mosley* explains that, in the context of the school forum, *Tinker* is the substantial government interest element of an equal protection analysis when such an analysis is necessary. When a content-based regulation is at issue *and* if the *Tinker* standard is met, then the next step is to determine whether the content-based regulation is narrowly tailored. The *Tinker* Court never reached this step because in *that* case the *Tinker* standard was *not* met. The *Mosley* opinion, by contrast describes what is done if the initial *Tinker* standard is met *and* a content-based regulation is at issue.

This understanding of the interrelation between *Tinker* and *Mosley* resolves the apparent conflicts that the panel struggles to address in its opinion.[1] See *Barr*, slip op. at 13-15.

* * *

[p.5]

school property, or within the school forum, than the plaintiff in *Morse*. In *both* cases the Supreme Court applied the *Tinker* standard, establishing that both plaintiffs were subject to the limited school forum. 127 S.Ct. 2618; 408 U.S. 92. In both cases the Supreme Court explained that the consideration of the *Tinker* standard was not the end of the analysis, but simply

---

[1] Note also that the panel's quote from *Tinker* in support of its assertion that actual viewpoint discrimination is permissible if the *Tinker* standard is applied, does not ***

the first step. The Supreme Court clearly intended its *Mosley* decision to be applied to the school forum.

B. The Panel's Opinion Violates *Mosley* in Light of *Turner Broadcasting v. F.C.C.* and *R.A.V. v. City of St. Paul*

The panel's analysis of appellants' equal protection claim essentially concludes that where a school has met the *Tinker* standard it has, per se, also proven that its regulation is narrowly tailored:

> "The question of whether the dress code's ban on racially divisive symbols is narrowly tailored to that purpose asks us to inquire whether the ban meets the standard set forth in *Tinker*. [Cites to previous *Tinker* analysis within the opinion] We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the school's substantial interest. . ." *Barr,* slip op. at 18.

This conclusion represents a bold dismissal of equal protection precedent as applied to the school setting. This Court appears to be stating that equal protection *cannot* be violated where a school reasonably forecasts disruption.

Alternatively, this may simply be a misunderstanding of the fact that the substantial-government-interest and the narrow-tailoring elements are just that, two distinct, different, and separate elements. As discussed above, *Tinker* simply addresses the substantial government interest element. Where viewpoint

* * *

[p.8]

with actual admissions from the appellees that they are not motivated solely by a desire to prevent disruption, narrow tailoring is even more necessary.[2,3]

The *Mosley* Court not only concluded that narrow tailoring required the defendants to provide *an individualized analysis* of *each prohibited display,* it also concluded that under such circumstances categorical bans, based upon content, should not be allowed at all. *Mosley,* 408 U.S. 92, 100-101.

In the instant case the appellees have admitted that they prohibit *all* displays of the Confederate flag, regardless of likelihood of disruption. JA 101, Dep. LaFon, 23:15-19; 24:5-10; JA 325 Prop. Pre-Trial Or., stip. 9. Therefore the appellants have at least raised a genuine issue regarding the school's failure to narrowly tailor its regulation.

---

[2] Note that the Supreme Court in *R.A.V.* stated that if there is a *possibility* that the defendant school is "seeking to handicap the expression of particular ideas" then the regulation is "presumptively invalid." *R.A.V.*, 505 U.S. at 394.

[3] In the instant case the Confederate flag is being singled out and treated differently than other symbols: the panel notes that "the school alleges that because other symbols have not yet caused a disruption, they have not been explicitly banned." *Barr,* slip op. at 16, citing J.A. at 110 (Hord Dep. At 14:24-15:4). However, the Confederate flag also has not yet caused a disruption, but *has* been explicitly banned.

C. The Panel's Opinion Violates *Tinker*

The standard established by the panel's opinion modifies the *Tinker* standard in a way that substantively weakens the Supreme Court's required showing. This fact is proven by the analysis performed by the panel in the instant case.

* * *

[p.11]

summary judgment for the defendant school. This Court's current standard results in just such a finding. It results in such a finding despite undisputed evidence that "the forbidden conduct" does not in fact cause any disruption. See *Barr,* slip op. at 5; J.A. at 51 (Lafon Aff. ¶4). This turns *Tinker* on its head.[4,5,6]

---

[4] On June 27, 2008 the 6th Circuit's Chief Judge Bogs entered a dissenting opinion in another appeal arising from the same underlying case as the instant appeal. See *D.B. v. Lafon*, Amd. Or. Judge Boggs dissent is critical of the standard applied in that appeal, which is very similar to the standard applied in the instant opinion.

[5] The *Tinker* Court stated: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" 393 U.S. at 512.

D. The Panel's Opinion Overturns this Court's Holding in *Castroina v. Madison County School Board*

The panel's *Castorina* decision clearly *holds* "If the students' claims. . .that there were no prior disruptive altercations as a result of Confederate flags are found credible, the court below would be *required* to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker." Castorina v. Madison County Sch. Bd.,* 246 F3d. 536 (2001). The panel's opinion discards that holding.

As the panel's opinion points out, however, such an overruling of this Court's precedent *requires* an en banc decision. *Barr,* slip op. at 14, citing *Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985).

[p.12]

E. The Panel Mis-Applied *U.S. v. Khalil* and Did Not Perform a De Novo Review

The panel's opinion explains that the appellants waived certain admissibility issues because they were not specific enough in raising objections to admissibility. *Barr,* slip op. at 9. However, this statement fundamentally misconstrues the procedural status of this case, the burdens at issue, and this Court's role in performing a de novo review.

The appellants, being the non-moving party, have no burden to prove that evidence relied upon by the moving party is inadmissible. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (986). To the contrary, at

this procedural stage the movant has the entire burden to prove that they can conclusively prove their case, via admissible evidence. *Id.* This is particularly true where the movant has the full burden of proof in the case, such as the school-defendants in the case at bar. See *Tinker*, 393 U.S. 503.

The appellants' suggestion that much of the movants' evidence is clearly inadmissible was simply intended to alert this Court to an evidentiary issue of particular importance. However, regardless of the presence or absence of the appellants' assertion, it is this *Court's* duty to consider *all* evidentiary issues, while performing its *de novo* review of the movants' evidence. *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485, 499 (1984). A review of this Court's opinion reveals

* * *

(3)

NO: 08-1325

In The

Supreme Court of the United States

DEREK BARR, CRAIG WHITE, and CHRIS WHITE,

Petitioners,

V.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

Van R. Irion
LAW OFFICE OF VAN R. IRION, PLLC
9040 Executive Park Drive, Suite 223
Knoxville, TN 37923
(865) 809-1505
Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

Question #1:

Are content-based restrictions on student speech narrowly tailored where they support the educational mission of the school, but also prohibit more speech than is necessary to prevent disruption?

Question #2:

Can the "offensiveness" of a symbol, coupled with a tense school environment, create an irrebuttable presumption that the symbol is likely to cause disruption?

Question #3:

Can restrictions on student speech in a public school be justified via a heckler's veto?

TABLE OF CONTENTS

	Page
Questions Presented[1]	i
Table of Contents	ii
Table of Authorities	iv
Reply Brief of the Petitioners	1
Summary	1
Respondents' Brief Misrepresented the Sixth Circuit's Holding on Substantial Government Interest	4
Tinker's Narrow Tailoring Requirement is Absent from the Sixth Circuit's Opinion	5
Irrebuttable Presumptions Are Inherent in the Sixth Circuit's Opinion	7
Undisputed Facts Support Granting the Petition	8
Respondents' Facts Are Disputed and Are Irrelevant to the Questions Presented	9

[1] The respondents' attempt to change those questions reflects respondents' understanding that the questions *as presented* should lead to reversal of the Sixth Circuit's ruling.

Mootness Does Not Apply to Claims for Damages 11

Heckler's Veto Raised Below 12

Conclusion 14

Appendix
Part A 1c
Petition for En Banc Rehearing

Part B
Partial Deposition Transcript of Alvin Hord 18c

Part C
Partial Deposition Transcript of Nicole White 22c

Part D
Declaration of Nicole White 24c

TABLE OF AUTHORITIES

Cases	**Page**
Brown v. Louisiana, 383 U.S. 131 (1966)	13
Cary v. Piphus, 435 U.S. 247 (1978)	12
Memphis Light, Gas, and Water Division v. Craft, 436 U.S. 1 (1978)	11, 12
Morse v. Fredrick, 127 S.Ct. 2618 (2008)	5
Police Dept. of the city of Chicago v. Mosley, 408 U.S. 92 (1972)	5
Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)	7, 9
Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)	Passim
Rules	
Federal Rule of Civil Procedure 8(f)	11
Dictionary	
Black's Law Dictionary (Bryan Garner ed., 7th Ed., West 1999)	7, 8

REPLY BRIEF OF PETITIONERS

The petitioners respectfully submit this reply brief to their petition for a writ of certiorari. This reply brief is submitted to point out factual errors and erroneous legal conclusions asserted in respondents' brief in opposition.

SUMMARY

Not one single fact asserted by the petitioners is denied, questioned, or even contextualized by the respondents' brief. Respondents fail to deny these facts because they understand that the facts relevant to support the instant petition are undeniable. The petition should be granted because it presents clear questions arising from undisputed facts.

Respondents' brief does cite, and misrepresents, evidence in an attempt to prove that racial tension was high in the school at issue. However, even if true, this fact simply illustrates that the new standard established by the Sixth Circuit violates existing precedent. Since undisputed evidence proves that the Confederate flag was present in the school at least dozens of times, yet caused no disruption at all, the Sixth Circuit's presumption that the Confederate flag will always cause disruption in schools with high racial tension is conclusively proven to be false. (*See* Pet. App. 12a; 73a).

Nothing in respondents' brief disputes precedent from other circuits that has found similar

speech restrictions unconstitutional when more speech was being restricted than was necessary to prevent disruption. Respondents' brief also agrees with the petitioners' assertion that the Sixth Circuit now interprets *Tinker* to allow schools to restrict more speech than is necessary to prevent disruption. Resp. Br. 10-12. Yet respondents' brief argues that this does not represent a circuit split on this issue. *Id* at 12-13.

Respondents' brief cites exactly zero cases where similar speech restrictions were found constitutional *despite the complete absence of evidence linking the banned symbol to any past disruptions.* The Sixth Circuit's new precedent abolishes *Tinker's* requirement that the school prove a link between the banned symbol and disruption caused by that symbol: "it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that *the students' activities* would materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513 (1969)(emphasis added).

The respondents' brief agrees with the Sixth Circuit's ruling that schools should be allowed to categorically ban the Confederate flag by simply establishing that "racial tension is high" in the school. Resp. Br. 10-12. Yet the respondents' brief failed to address the fact that tension was extremely high regarding the Vietnam war at the time of *Tinker*. In *Tinker* high tension alone was not enough to justify that ban. To the contrary, the *Tinker* Court specifically discussed the volatile environment, but

then pointed to a lack of any link between "engaging in the forbidden conduct" and any past disruptions, holding that in the absence of such evidence the ban was based upon "undifferentiated fear." *Tinker*, 393 U.S. at 508 & 509. Therefore, the Sixth Circuit opinion has effectively overruled the Supreme Court.

Next, the respondents' brief denies that the lower courts created an irrebuttable presumption. Resp. Br. 17. However, this assertion is refuted by the simple language of the Sixth Circuit's holding: "We simply hold that the school's dress code as applied to the ban on the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high." Pet. App. 29a. Presumption: where racial tension is high, the Confederate flag will cause disruption. (*See* Black's Law Dictionary, 1203-4 (Bryan Gardner ed., 7th ed., West 1999). Ignoring direct and undisputed evidence to the contrary, on review of summary judgment, raises the presumption to irrebuttable status. *Id.*

Finally, the respondents' brief takes great effort to convince this Court that the Sixth Circuit didn't hold the school's substantial government interest to be its broad mission to "educate students." Resp. Br. 8-9. But again, the respondents brief attempts to hide the simple language of the Sixth Circuit's holding. (*See* Pet. App. 47a.)

RESPONDENTS' BRIEF MISREPRESENTED THE SIXTH CIRCUIT'S HOLDING ON SUBSTANTIAL GOVERNMENT INTEREST

The challenged Sixth Circuit opinion clearly states "We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the state and the school's substantial interest in educating students, and we affirm the district court's grant of summary judgment to Defendants-Appellees on Plaintiffs-Appellants' Equal Protection claim." Pet. App. 47a. Yet the respondents' brief asserts "The Sixth Circuit did not designate the school's broad educational mission as the substantial governmental interest." Resp. Br. 8.

In an effort to support their assertion the respondents brief completely ignores the appellate court's one-sentence holding and instead quotes a section of the court's opinion that had nothing to do with equal protection analysis. *Id* (*quoting* Pet. App. 16a).

This quote is further used to misrepresent the lower court's opinion by placing it back-to-back in a single paragraph with another quote from the opinion. *Id*. The second quote begins with "Therefore,..." The clear intent of the respondents brief is to imply that the conclusion of the second quote flows from the discussion of the preceding quote. *Id*. However, the actual opinion has *two intervening pages* between these two quotes. (*Compare* Resp. Br. 8 *to* Pet. App. 16a & 20a).

The respondents efforts to re-write the Sixth Circuit's opinion, rather than acknowledge its one-sentence holding, reflects their understanding that the challenged opinion would eliminate any narrow tailoring requirement in the school setting. It reflects the respondents understanding that the challenged opinion creates a Circuit split on these issues. Finally, it reflects the respondents' understanding that the challenged opinion flaunts the explicit warning of two Supreme Court justices. (*See Morse v. Frederick*, 127 S.Ct. 2618, 2637 (2008)).

TINKER'S NARROW TAILORING REQUIREMENT IS ABSENT FROM THE SIXTH CIRCUIT'S OPINION

The respondents' brief correctly points out that the *Tinker* standard incorporates a narrow tailoring requirement. Resp. Br. 10-12. However, the respondents ignore the fact that the Sixth Circuit's opinion eliminates that narrow tailoring requirement. (*See* Pet. App. 46a-47a).

A regulation that prohibits more speech than is necessary to prevent disruption is not narrowly tailored. *Police Dept. of the city of Chicago v. Mosley*, 408 U.S. 92, 99 & 101 (1972). A regulation can prevent disruption *and* can *also* fail to be narrowly tailored. For example, a regulation that prohibits *all* expression of opinion would be certain to prevent disruption, but would *also* be completely untailored and would therefore be certain to violate the First Amendment.

The *Tinker* opinion incorporates the narrow tailoring requirement. It requires a school to prove that a "prohibition of expression...*is necessary* to avoid material and substantial interference with schoolwork." *Tinker,* 393 U.S. at 511(emphasis added). Therefore, if expressions of opinion are *unnecessarily* prohibited, then the regulation "is not constitutionally permissible." *Id.* In other words, if a regulation prevents disruption but also prevents more speech than is necessary to prevent that disruption, it is not narrowly tailored. *Tinker* clearly requires schools to tailor their speech restrictions to prevent only those expressions of opinion that are "necessary" to prevent disruption. *Id.*

Yet the Sixth Circuit's ruling explicitly rejected the narrow tailoring requirement. Instead it concluded "our analysis of the Plaintiff-Appellants' Equal Protection claim is essentially the same as our analysis of Plaintiff-Appellants' First Amendment claim." Pet. App. 46a. It later concludes, "We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the state and the school's substantial interest in educating students." Pet. App. 47a. But this analysis ignores the critical point that even if the ban prevents disruption, it must *also* prevent no more speech than is necessary to prevent that disruption. *Tinker*, 393 U.S. at 511.

The Sixth Circuit acknowledged and dismissed undisputed evidence that the challenged regulation prohibits *all* displays of the Confederate flag, even when school officials are certain that such a display will not, in fact, cause any disruption. Pet. App. 4a &

12a (*see also* Pet. App. 124a, 130a, 134a-135a). It dismissed this undisputed fact because it omitted the narrow tailoring requirement of *Tinker*.

The challenged ruling not only violates Supreme Court precedent, it also leaves a clear Circuit split on this issue. While respondents' brief claims that no conflict exists, it fails to address any of the cases presented from other Circuits with opposite rulings. *See* Pet. Br. 18-21 (*citing* five cases from three other Circuits).

The respondents' brief does not address this precedent because the respondents realize that the challenged ruling creates a clear Circuit split on the issue of narrow tailoring in the school setting.

IRREBUTTABLE PRESUMPTIONS ARE INHERENT IN SIXTH CIRCUIT'S OPINION

Respondents' brief denies that the Sixth Circuit created any presumptions in reaching the challenged decision. Resp. Br. 18. Instead they claim that the Sixth Circuit "merely drew inferences."[2] *Id.*

However, Black's Law Dictionary defines "presumption" as "A legal inference or assumption." 1203 (Bryan Garner ed., 7th ed., West 1999). In other

---

[2] The respondents' brief apparently concedes that the Sixth Circuit failed to follow its own precedent that in considering summary judgment Courts "must give the *non-movant* the benefit of every reasonable inference." *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005)(emphasis added).

words, *an inference is a presumption*. Therefore, by the respondents own admission the challenged ruling created a presumption. *Id* at 1203. It then raised that presumption to irrebuttable status.

The challenged ruling upheld entry of *summary judgment* despite undisputed evidence that the Confederate flag had been present in the school dozens of times, yet had never caused any disruption whatsoever. (*See* Pet. App. 12a; 73a). The Sixth Circuit's holding not only creates a presumption that the Confederate flag will cause disruption in a school where racial tension is high, it ignores direct and undisputed evidence to the contrary. *Id*. This is the definition of an irrebuttable presumption. Black's Law Dictionary, 7th ed. 1203-4.

UNDISPUTED FACTS SUPPORT GRANTING THE PETITION

The respondents did not dispute the facts as set forth by the petitioners. The undisputed facts set forth by the petitioners' fully support granting the petition.

Respondents did assert additional facts in an attempt to show "high racial tension" in the school at issue. However, none of the facts cited by the respondents' show a link between the Confederate flag and any disruption. The only connections between the Confederate flag and disruptions are in the minds of the respondents, and in the presumptions of the lower courts. Absolutely no *evidence* makes this connection.

RESPONDENTS' FACTS ARE DISPUTED AND ARE IRRELEVANT TO THE QUESTIONS PRESENTED

It is important to keep in mind that the challenged opinion upheld summary judgment against the petitioners. Pet. App. 3a. Yet most of the facts asserted by the respondents' brief, and relied upon by the courts below, are supported only by an affidavit of a named defendant.[3] Resp. Br. 2-3. Existence and admissibility of evidence supporting the respondents' broad assertions has been disputed at every stage of this litigation. (*See* Pet. for En Banc Rehearing filed with the Sixth Circuit, reproduced below at Pet. Reply Br. App. 1c-17c).

The respondents assert that there were physical altercations between Caucasian and African-American students, as well as multiple threats against African-American students. Resp. Br. 2-3. Yet the only citation supporting this assertion is an affidavit of a named defendant. *Id.*

Next the respondents assert that the school at issue was "locked down" because of threats of violence against African-Americans, again simply citing the named defendant's affidavit. Resp. Br. 2-3. Yet the motive for the lock down has always been hotly disputed. The same defendant later testified that he locked down the school to give the public impression that he was "doing something" about

---

[3] The presumptions made by the lower courts in this case reflect those courts giving the wrong party "every reasonable inference." *Spirit Airlines*, 431 F.3d 917.

perceived problems in the school. Depo. Hord, Jan. 4, 2007, reproduced at Pet Reply Br. App. 18c-21c.

Next, the respondents and the lower courts all cite petitioners' deposition statements regarding racially related violence and threats of violence at the school, as well as petitioners' statements about how other symbols were handled by the respondents. Resp. Br. 3-4. Yet these statements were made about incidents to which the petitioners had *no personal knowledge*. The questions cited asked the petitioners about their *impressions* and what they had heard from other students. The Sixth Circuit refused to consider petitioners' objections regarding these statements. (*See* Pet. App. 21a-22a; *see also* Pet. for En Banc Rehearing filed with the Sixth Circuit, reproduced below at Pet. Reply Br. App. 1c-17c). [4]

The respondents' brief was also misleading about certain facts. In their brief the respondents state that students were informed that the ban on the Confederate flag was "due to the racial hostility" at the school, citing the Sixth Circuit's opinion. Resp. Br. 3 (citing Pet. App. 4a). Yet, the citation does not support the respondents' assertion of racial hostility being announced as the motive for the ban. *See* Pet. App. 4a.

What is left of the respondents' new facts are some statistics regarding percentage of minorities in the school, and some graffiti that lead to no

---

[4] Note that the Sixth Circuit explicitly refused to consider evidentiary objections raised by the plaintiff-appellants, and therefore refused to perform an en banc review of facts. (*See* App 21a-22a; *see also* App. 1c-17c).

disruptions whatsoever. If graffiti and population statistics suffice to support speech restrictions in schools, no school in the country would have any free speech.

Most importantly, none of the respondents' asserted facts change or challenge one single fact asserted by the petitioners in support of their petition. The facts that support the petition are undisputed.

The petition should be granted because it presents clear questions arising from undisputed facts.

MOOTNESS DOES NOT APPLY TO CLAIMS FOR DAMAGES

Respondents' brief incorrectly asserts that the instant petition should be denied as moot. Resp. Br. 4-6. Respondents' argument rests on their assertion that no evidence of damages was entered into the record prior to summary judgment, and that "Petitioners sought no nominal damages." [5] *Id.*

This Court has previously explained that a claim for damages *alone* is sufficient to overcome mootness, so long as the claim for damages is not so insubstantial as to prevent proceeding with the instant review. *Memphis light, Gas, and Water Division v. Craft*, 436 U.S. 1, 10 (1978).

---

[5] Respondents' attempt to deny this Court jurisdiction of the instant case by pointing to a pleading technicality also runs contrary to the Federal Rules of Civil Procedure that "All pleadings shall be so construed as to do substantial justice." Rule 8(f).

The petitioners' complaint includes a request for damages. Resp. Br. 6, *citing* Resp. Br. App. 19b, 20b. Therefore, this petition cannot be held moot. *Memphis light, Gas, and Water Division*, 436 U.S. 1.

Also, as respondents pointed out, "Petitioners prayed for damages, according to proof." Resp. Br. 6, *citing* Resp. Br. App. 19b, 20b. Damages "according to proof" is inclusive of nominal damages because deprivation of constitutional rights "that are not shown to have caused actual injury" result in an award of nominal damages. *Cary v. Piphus*, 435 U.S. 247, 266 (1978). Therefore, if the "proof" shows no actual damages, then nominal damages are awarded.

Also, actual proof of damages has been shown. Certain petitioners declined to re-enroll in public school because of the challenged regulation. Pet. Reply Br. App. 19c-21c. These petitioners, therefore, lost the monetary value associated with receiving a public education and also incurred costs associated with home schooling.

For all of the above reasons, petitioners' claims for damages cannot be held moot.

HECKLER'S VETO RAISED BELOW

Respondents brief asserts that "The record is devoid of any evidence of a 'heckler's veto.'" Resp. Br. 7. However, respondents' justification of their speech restriction is based upon *their* own assertion that other students respond negatively to the Confederate flag in a school with a racially tense environment.

See Resp. Br. at 3. The respondents' own assertions fit the definition of a "heckler's veto": a listeners' negative reactions to a particular message. (*See Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)). The fact that the respondents didn't use the term "heckler's veto" doesn't change the fact that their defense has relied upon a heckler's veto argument from the beginning.

The forecasted disruptions had to be premised upon expected negative reactions of listeners because no wearer of the banned symbol ever caused a disruption. Pet. App. 73a. It is undisputed that several students displayed the Confederate flag in the school at least dozens of times, but none of those students ever caused any disruptions. Pet. App. 12a & 73a; Pet. Reply Br. App. 21c. Since the students wearing the flag were not the source of any trouble, the *only* logical conclusion is that the forecasted disruptions upon which the respondents justify their speech restriction *must* be anticipated to be caused by *other* students reacting negatively to the Confederate flag. Again, this is a heckler's veto.

Presumptions that a heckler's veto would lead to disruption was at the core of the respondents own defense, and were the at the core of the lower court's rulings.

This logic is confirmed by the Sixth Circuit's opinion: "Hord acknowledges that the disruption he anticipates arising from displays of the Confederate flag directly correlates with the offense the flag poses to some students." Pet. App. 27a.

CONCLUSION

For the reasons discussed above the request for a writ of certiorari should be granted.

Respectfully submitted,

Van R. Irion
Attorney for Petitioners
Law Office of Van R. Irion
9040 Executive Park Drive
Suite 223
Knoxville, TN 37923
(865) 809-1505

APPENDIX
Part A
Petitioners' Petition for En Banc Rehearing

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEREK BARR, CRAIG WHITE
and CHRIS WHITE, by and
through their parent and guardian,
ROGER WHITE

Plaintiffs/Appellants,

CASE NO: 07-5743

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD

Defendants/Appellees

APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

I. STATEMENT FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure plaintiff/appellants hereby petition this Court for a rehearing with

suggestion for rehearing en banc. Rehearing is requested from this Court's published opinion in the above-entitled case, entered August 20, 2008. See *Barr v. Lafon*, 07-5743 (6th Cir. Aug. 20, 2008).

The grounds supporting this petition include plaintiff-appellants respectful assertion that the panel decision conflicts with the United States Supreme Court's decisions in *Turner Broadcasting v. F.C.C.*, *R. A. V. v. City of St. Paul*, *Department of the City of Chicago v. Mosley*, and *Tinker v. Des Moines Independent Community School District*. 512 U.S. 622 (1994); 505 U.S. 377 (1992); 408 U.S. 92 (1972); 393 U.S. 503 (1969) (respectively). Therefore consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

This petition is also grounded upon the panel decision's overturning of the holding of this Circuit's decision in *Castorina v. Madison County School Board*. 246 F3d. 536 (2001).

Finally, this petition is also grounded upon the plaintiff-appellants respectful assertion that the panel erroneously applied an abuse of discretion standard in reviewing admissibility of evidence when de novo review is the correct standard.

II. BACKGROUND

Plaintiff-appellants are students attending public high school in Blount County Tennessee. The appellants filed suit alleging violations of their First and Fourteenth Amendment rights caused by the enforcement of a ban on all depictions of the

Confederate flag at their high school. The District Court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. The plaintiffs appealed and this Court upheld the District Court's summary dismissal in an opinion recommended for publication. See *Barr v. Lafon*, 07-5743 (6th Cir. Aug. 20, 2008).

III. GROUNDS

A. The Panel's Distinguishing of the Instant Case from *Mosley* is Contrary to Precedent

The panel's opinion distinguished the Supreme Court's *Police Department of City of Chicago v. Mosley* from the instant case by stating:

> "*Mosley* involved adult speech in a public forum, while the instant case involves student speech in a public school, which is a limited public forum. Thus, *Tinker* sets the guiding standard for the instant case while that was not true of *Mosley*." *Barr*, slip op. at 18, *discussing* 408 U.S. 92 (1972).

The appellants respectfully assert that *Mosley* did, in fact, explicitly follow *Tinker*. *Mosley* is an extension of *Tinker*. *Mosley* explains that, in the context of the school forum, *Tinker* is the substantial government interest element of an equal protection analysis when such an analysis is necessary. When a content-based regulation is at issue *and* if the *Tinker* standard is met, then the next step is to determine

whether the content-based regulation is narrowly tailored. The *Tinker* Court never reached this step because in *that* case the *Tinker* standard was *not* met. The *Mosley* opinion, by contrast describes what is done if the initial *Tinker* standard is met *and* a content-based regulation is at issue.

This understanding of the interrelation between *Tinker* and *Mosley* resolves the apparent conflicts that the panel struggles to address in its opinion.[6] See *Barr*, slip op. at 13-15.

This is why the *Mosley* Court cites, discusses, and quotes *Tinker* throughout its opinion. *See* 408 U.S. 92 (1972). *Mosley* followed, and then extended *Tinker*. See *Id.* This is why the *Mosley* opinion explicitly discusses the "intersection" of free expression and equal protection. *Id* at 101.

The two distinguishing facts identified by this Court between the instant case and *Mosley* are not dispositive. The *Mosley* opinion itself, as well as the Supreme Court's recent decision in *Morse v. Frederick* illustrate this point. In *Morse* the student

---

[6] Note also that the panel's quote from *Tinker* in support of its assertion that actual viewpoint discrimination is permissible if the *Tinker* standard is applied, does not support that assertion. See *Barr*, Slip op. at 13, quoting *Tinker* at 511. The *Tinker* quote is affirmatively pointing out what is *not* constitutional. Taking positive inference taken from what this quote explicitly chooses to *not* consider (what is constitutional) is a certain path to unintended meaning. In other words, *Tinker*'s statement that viewpoint discrimination is not allowed "at least" in the absence of specific circumstances, does not lead to the conclusion that viewpoint discrimination *is* allowed in *all* cases if those circumstances were present. The absence of a negative does not prove the presence of the positive.

at issue was an eighteen year old senior who was standing across the street from the school, completely off school property, at the time of the challenged incident. *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006). He had not attended class nor had he checked in with the school in any way on the day of the incident. *Id.* Yet despite these facts the Supreme Court applied the *Tinker* standard, declaring that the plaintiff was subject to the limited school forum. *Morse v. Frederick*, 127 S.Ct. 2618 (2007).

By way of comparison, the plaintiff in *Mosley* was arrested while standing on the sidewalk "adjoining" the school. 408 U.S. at 93. Arguably he was more on school property, or within the school forum, than the plaintiff in *Morse*. In *both* cases the Supreme Court applied the *Tinker* standard, establishing that both plaintiffs were subject to the limited school forum. 127 S.Ct. 2618; 408 U.S. 92. In both cases the Supreme Court explained that the consideration of the *Tinker* standard was not the end of the analysis, but simply the first step. The Supreme Court clearly intended its *Mosley* decision to be applied to the school forum.

B. The Panel's Opinion Violates *Mosley* in Light of *Turner Broadcasting v. F.C.C.* and *R.A.V. v. City of St. Paul*

The panel's analysis of appellants' equal protection claim essentially concludes that where a school has met the *Tinker* standard it has, per se, also proven that its regulation is narrowly tailored:

"The question of whether the dress code's ban on racially divisive symbols is narrowly tailored to that purpose asks us to inquire whether the ban meets the standard set forth in *Tinker*. [Cites to previous *Tinker* analysis within the opinion] We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the school's substantial interest..." *Barr*, slip op. at 18.

This conclusion represents a bold dismissal of equal protection precedent as applied to the school setting. This Court appears to be stating that equal protection *cannot* be violated where a school reasonably forecasts disruption.

Alternatively, this may simply be a misunderstanding of the fact that the substantial-government-interest and the narrow-tailoring elements are just that, two distinct, different, and separate elements. As discussed above, *Tinker* simply addresses the substantial government interest element. Where viewpoint discrimination has *not* been alleged, or where the regulation is clearly a content-neutral regulation, then the *Tinker* standard alone completes the analysis. But where the regulation is content-based, then fulfilling *Tinker* is only the first step. Concluding otherwise would negate the need for any discussions regarding the intersection of free speech and equal protection. See *Police Department of the city of Chicago v. Mosley*, 408 U.S. 92 (1972).

The *Mosley* opinion specifically explains that even when a regulation can be justified under its

"clearly more disruptive" test, that regulation must *still* be narrowly tailored:

> "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored *to their legitimate objectives.*" *Mosley*, 408 U.S. at 101 (emphasis added; explicitly discussing *Tinker*).

The term 'narrowly tailored', as it is used in the *Mosley* case, is also well established: Where a regulation on speech is content-based, ***the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of the asserted governmental interest***. *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994); *Mosley*, 408 U.S. 92; *Williams v. Rhodes*, 393 U.S. 23 (1968). In other words, if the regulation bans expressions that could be allowed while still achieving the regulation's goal, then it is not narrowly tailored.

Therefore in the instant case, even if the Confederate flag is "clearly more disruptive" than other flags (*Tinker* standard), the defendants' regulation *still* must not be more restrictive than is absolutely essential to prevent disruption in the school. *Id.* In other words, the defendants' regulation must not prohibit displays of the Confederate flag that would *not* cause disruption. *Id.* In other words, if it is possible to allow some displays while still preventing disruption, then the school *must* do so. *Id.* Under the circumstances of *Mosley*, that Court concluded that narrow tailoring required

individualized analysis of particular displays' potential for disruption.

The *Mosley* Court drew the narrow tailoring line where it did because it was attempting to balance the conflicting concerns of governmental suppression of ideas against the identified substantial governmental interest. *Mosley*, 408 U.S. at 98-99; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The more specifically a regulation defines what is prohibited, the more likely that regulation is actually being used by government officials to punish unpopular ideas. See *Id.* Therefore, the degree of narrow tailoring required is directly proportional to the degree a regulation is content-based (or viewpoint-based). See *Id.*

In the instant case, the more narrowly this Court allows the appellants to define what is prohibited (racially divisive speech as opposed to all race-related speech), the more narrowly tailored the regulation should be. This Court's wholesale rejection of appellants' viewpoint discrimination argument should tend to make the Court *more* likely to adopt the limitations of *Mosley*. When coupled with actual admissions from the appellees that they are not motivated solely by a desire to prevent disruption, narrow tailoring is even more necessary.[7,8]

---

[7] Note that the Supreme Court in *R.A.V.* stated that if there is a *possibility* that the defendant school is "seeking to handicap the expression of particular ideas" then the regulation is "presumptively invalid." *R.A.V.*, 505 U.S. at 391.

[8] In the instant case the Confederate flag is being singled out and treated differently than other symbols: the panel notes that "the school alleges that because other symbols have not yet caused a disruption,

The *Mosley* Court not only concluded that narrow tailoring required the defendants to provide *an individualized analysis* of *each prohibited display*, it also concluded that under such circumstances categorical bans, based upon content, should not be allowed at all. *Mosley*, 408 U.S. 92, 100-101.

In the instant case the appellees have admitted that they prohibit *all* displays of the Confederate flag, regardless of likelihood of disruption. JA 101, Dep. LaFon, 23:15-19; 24:5-10; JA 325 Prop. Pre-Trial Or., stip. 9. Therefore the appellants have at least raised a genuine issue regarding the school's failure to narrowly tailor its regulation.

C. The Panel's Opinion Violates *Tinker*

The standard established by the panel's opinion modifies the *Tinker* standard in a way that substantively weakens the Supreme Court's required showing. This fact is proven by the analysis performed by the panel in the instant case.

The *Tinker* standard requires a showing that "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school...'" *Tinker*, 393 U.S. at 509. This requirement is directly juxtaposed with an explicit explanation of

---

they have not been explicitly banned." *Barr*, slip op. at 16, citing J.A. at 110 (Hord Dep. At 14:24-15:4). However, the Confederate flag also has not yet caused a disruption, but *has* been explicitly banned.

what is *not* sufficient to justify restrictions on student speech:

> "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person *may* start an argument *or cause a disturbance*. But our Constitution says we must take this risk." *Tinker*, 393 U.S. at 508 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949) (emphasis added).

"May" cause a disturbance is *not* sufficient. *Id.* Instead the defendant school must show that the forbidden conduct *would* cause disruption. *Id* at 509.

Compare the *Tinker* standard with this Court's incrementally weakened standard: a school must only show that their "forecast of substantial disruption was reasonable." *Barr*, slip op. at 9, citing *Lowery v. Euverard*, 497 F.3d 584, 591 (6th Cir. 2007). In the instant case, this standard is even further weakened to simply require a showing that "racially motivated incidents at the school caused tension among the student body." *Barr*, slip op. at 7.

This weakened standard caused this Court to completely ignore undisputed evidence that "the forbidden conduct" occurred dozens of times in the school, yet caused absolutely no disruption. *Barr*, slip op. at 5; J.A. at 51 (Lafon Aff. ¶4). This Court concluded, despite this evidence, that no genuine issue of fact exists and the party with the full burden has conclusively proven its case.

In *Tinker* the armbands in question had not caused any actual disruption. 393 U.S. at 505-6. In the instant case the forbidden conduct has not caused any disruption. See *Barr*, slip op. at 7. Yet this Court has concluded that no genuine issue of fact exists and the party with the full burden has conclusively proven its case.

In *Tinker* former students from the school *had died in a war* that was the subject of the debate at issue. Clearly the students at the school felt some "tension among the student body" in relation to this issue. But in the case at bar evidence of "racial tension among the student body" led this court to conclude that the school's "forecast of substantial disruption was reasonable." The panel's opinion discusses evidence of racial tension as if the school in *Tinker* had absolutely zero tension among the student body regarding the war in Vietnam.

The erroneous conclusions by this Court in analyzing the instant case, despite facts analogous to the quintessential case, demonstrates just how far the incremental weakening of *Tinker* has progressed in this Circuit.

The appellants are not suggesting that evidence of racial tension has no relevance to the school's required showing. They are simply pointing out that such evidence, alone, does not constitute conclusively proven justification warranting summary judgment for the defendant school. This Court's current standard results in just such a finding. It results in such a finding despite

undisputed evidence that "the forbidden conduct" does not in fact cause any disruption. See *Barr*, slip op. at 5; J.A. at 51 (Lafon Aff. ¶4). This turns *Tinker* on its head.[9,10,11]

D. The Panel's Opinion Overturns this Court's Holding in *Castroina v. Madison County School Board*

The panel's *Castorina* decision clearly *holds* "If the students' claims...that there were no prior disruptive altercations as a result of Confederate flags are found credible, the court below would be *required* to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker*." *Castorina v. Madison County Sch. Bd.*, 246 F3d. 536 (2001). The panel's opinion discards that holding.

As the panel's opinion points out, however, such an overruling of this Court's precedent *requires* an en banc decision. *Barr*, slip op. at 14, citing *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

---

[9] On June 27, 2008 the 6th Circuit's Chief Judge Boggs entered a dissenting opinion in another appeal arising from the same underlying case as the instant appeal. See *D.B. v. Lafon*, Amd. Or. Judge Boggs dissent is critical of the standard applied in that appeal, which is very similar to the standard applied in the instant opinion.

[10] The *Tinker* Court stated: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" 393 U.S. at 512.

E. The Panel Mis-Applied *U.S. v. Khalil* and Did Not Perform a De Novo Review

The panel's opinion explains that the appellants waived certain admissibility issues because they were not specific enough in raising objections to admissibility. *Barr*, slip op. at 9. However, this statement fundamentally misconstrues the procedural status of this case, the burdens at issue, and this Court's role in performing a de novo review.

The appellants, being the non-moving party, have no burden to prove that evidence relied upon by the moving party is inadmissible. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). To the contrary, at this procedural stage the movant has the entire burden to prove that they can conclusively prove their case, via admissible evidence. *Id.* This is particularly true where the movant has the full burden of proof in the case, such as the school-defendants in the case at bar. See *Tinker*, 393 U.S. 503.

The appellants' suggestion that much of the movants' evidence is clearly inadmissible was simply intended to alert this Court to an evidentiary issue of particular importance. However, regardless of the presence or absence of the appellants' assertion, it is *this Court's* duty to consider *all* evidentiary issues, while performing its *de novo* review of the movants' evidence. *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485, 499 (1984). A review of this Court's opinion reveals that it simply presumed admissibility

of all of movants' evidence, in the absence of required foundational support.

In support of it's assertion that the non-movant waived all admissibility issues this Court's opinion cites *U.S. v. Khalil* stating that "all evidentiary rulings of the district court, including it's determination of whether testimony is inadmissible hearsay, are reviewed for abuse of discretion." *Barr*, slip op. at 9. However, *Khalil* is inapplicable because it involved a *post-trial* review of admissibility in relation to specific objections made at trial. The appellants in the case at bar have not had their trial yet. That is why de novo review is required.

More importantly, because of the procedural status of the instant case the movant has not provided the required foundational support that would allow an in-depth analysis of evidence on an objection-by-objection basis. The appellants cannot be expected to provide a detailed analysis of objections where the movant has not yet provided the foundational evidence that would allow such analysis.

At the summary judgment stage the movants' have the *full burden* to provide any required foundational support that *proves* that their substantive evidence is admissible. That is why all possible inferences must be made for the non-movant, and why de novo review is required. *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 700 (6th Cir. 2007).

This Courts opinion explicitly states that it applied an abuse of discretion standard in reviewing admissibility of evidence:

> "Because the Plaintiffs-Appellants do not specify to which pieces of evidence they are referring, we have no basis upon which to conclude that the district court abused its discretion..." *Barr*, slip op. at 9.

This is simply an erroneous standard, explicitly applied. See *Clay*, 501 F.3d at 700.

A review of the panel's opinion further reveals that it inappropriately weighed evidence and erroneously ignored inferences that favored the appellants. Space limitations for the purposes of this petition do not allow for a comprehensive review of the panel's treatment of evidence. However, by way of example:

1. The panel's factual conclusion that the February 22 fight was racially motivated is directly contradicted by official conclusions of a U.S. Department of Education investigation. Compare *Barr*, slip op. at 3 with JA 291 (USDE ltr). The panel's opinion actually *guesses* that the Department of Education made incorrect conclusions in its official investigation. *Barr*, slip op. at FN 2.

2. Undisputed evidence proves that the Confederate flag was present in the School

at least dozens of times, despite the ban, yet never caused a single disruption. *Barr*, slip op. at 5, citing JA at 51 (Lafon Aff. At ¶ 4). The panel never discusses the relevance of this evidence and refused to accept the inference that if the symbol at issue actually *did not* cause disruption, a forecast that it *would* cause disruption *may* be unreasonable.

3. The panel makes passing note of defendant Hord's admission that he would keep the ban in place even if he knew the Confederate flag would not cause disruption, yet the panel dismisses this evidence as completely irrelevant. *Barr*, slip op. at 5 & 11.

Rather than performing a de novo review and giving the non-movant all reasonable inferences, the panel's opinion adopts all of the movants' evidence as per se admissible as well as conclusive on the points of fact asserted by the movant.

IV. CONCLUSION

The appellants respectfully request that this Court **GRANT** the appellants' petition to rehear this appeal.

Dated: 9/4/08

s/Van R. Irion
Van R. Irion BPR# 024519
2327 Laurel Lake Road
Knoxville, TN 37932

Attorney for Plaintiff-
Appellants
(865) 809-1505

CERTIFICATE OF SERVICE

It is hereby certified that on September 4, 2008, a copy of "Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc" was mailed to counsel for all appellees.

Dated: 9/4/08

s/Van R. Irion
Van R. Irion BPR# 024519

Part B
Partial Deposition Transcript of Alvin Hord, January 4, 2007

DEPOSITION OF ALVIN LEE HORD

January 4, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

Civil Action
No. 3:06-CV-75 (VARLAN/SHIRLEY)

In time would that be enough to lock-down the campus?
A. Yes, it has been locked down before, we have had a gun there before.
Q. Would you lock-down the campus if there was a threat of the gun?
A. I would depend on the Principals, the School Resource Officers and the people that were there.
Q. The circumstances of the given case; right?
A. Yes. And the Principal has that authority and the SRO's under his direction to do that.
Q. Has a threat of a gun on campus or information about a gun on campus ever led to a lock-down in any of the schools in Blount County that you're aware of?
A. Well, I—yes, in February of 2003 there was a threat of a gun and the school was locked-down and they found one.
Q. All right. And so the threat of a gun or I should say information coming to you that a gun was on campus on April 6, 2005 by itself would have been enough to lock-down the campus on that day?
A. Yes.
Q. And isn't it that what the lock-down was really about?
A. No.
Q. So the lock-down was about other things as you said, the build-up?
A. I was accused of not being—not going to do anything.

and I was accused of doing too much, and all the accusations of people saying, you know, you're not doing anything, you're ignoring this, I was trying to lay to rest. And in this climate of Columbine and everything that has happened, I don't think that I could have not taken the action that I did that day. And it is just a culmination of all that, it is not one specific thing but it is a lot of things.

Q. So you were concerned about the Cleveland case—let me rephrase.

The fact that the Cleveland case was—or the—let me try it again.

The incidents of February '05 leading to a complaint was part of what you're talking about now?

A. That was not Cleveland, that was another.

Q. Another student?

A. Another student.

Q. But that was part of the build-up?

A. Yeah, it was part of it.

Q. And Mr. Cleveland's numerous calls and complaints were part of it?

A. It was part of it.

Q. And so you did want to show that you were doing something?

A. And I wanted to show the people that they could send kids to school and they would be safe and there wouldn't be any

guns there. And rumors were going around that there were guns there and I was trying to dispel that and lay that to rest.
Q. The incidents that led up to the lock-down, were any of the plaintiffs in this case involved in any of those incidents to your knowledge?
A. Not to my knowledge, no.
Q. And were the Plaintiffs in this case involved in the February '05 incident?
A. Not to my knowledge.
Q. Are you aware of the Plaintiffs in this case being disciplined for anything?
A. No. I became aware of it after the suit was filed and, you know, all up to that point I was not.
Q. So we have discussed the lock-down of April 6 and we have discussed the February '05 incident and you have mentioned several other things that build-up to the lock-down. Are there any other incidents that we haven't mentioned yet that you would cite for justification on the Confederate flag?
A. Not—the only thing that I can think of is that letter that Vandy Kemp dealt with a student at Heritage, it was not the same school, but that was stuff where she responded about the ban, why the—
Mr. Irion: That will be disclosed: correct?
A. Yes.
Ms. Atkins: Yes. Do you want to see it?

Part C
Partial Deposition Transcript of Nicole White, January 4, 2007

DEPOSITION OF NICOLE WHITE

January 4, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

Civil Action
No. 3:06-CV-75 (VARLAN/SHIRLEY)

A. I'm a junior in the process of getting home schooled.
Q. You're a junior at William Blount High School?
A. Uh-huh (Affirmative).
Q. And you're in the process of getting home schooled; is that right?
A. Yeah.
Q. All of your high school, has it been at William Blount High School?
A. Yes.
Q. Do you remember at the end of the '04-'05 school year when there was some racial tensions at William Blount High School?
A. Yeah.
Q. Can you express what your rememberance of those problems consisted of?
A. I thing for about a week there was eighty cops there and they would check you when you go in any when you leave because of the hit list, but that's about it.
Q. Were you aware of the hit list?
A. Yes.
Q. Tell me whay you know about the hit list.
A. It was in one of the girls' bathroom stalls

Part D
Declaration of Nicole White, January 4, 2007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEREK BARR; CRAIG WHITE
and CHRIS WHITE both minors, by and
through their parent and guardian,
ROGER WHITE

Plaintiffs/Appellants,

v. CASE NO: 07-5743

STEVE LAFON, in his individual and official
Capacity as Principal of William Blount High
School; ALVIN HORD, in his official capacity
as Director of Schools; and THE BLOUNT
COUNTY SCHOOL BOARD

Defendants/Appellees

DECLARATION OF CHRIS NICOLE WHITE

(C.W.)

I, Chris Nicole White declare as follows:

1. I am a plaintiff-appellant in the above-entitled action.

2. I would like to resume attendance of my classes at William Blount High School, and would do so if the ban on the display of Confederate flags was lifted.
3. I declare under penalty of perjury that the foregoing is true and correct.

Dated: 7/3/07

s/Nicole White
Chris Nicole White
Appellant